IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

Original, No. .

In Equity.

THE STATE OF NEW MEXICO, PLAINTIFF,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR OF THE UNITED STATES, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, DEFENDANTS.

Comes now the State of New Mexico, by its Attorney General, Frank W. Clancy, and its State Commissioner of Public Lands, Robert P. Ervien, and moves the court that the State of New Mexico be permitted to file its bill of complaint in equity against Franklin K. Lane, Secretary of the Interior of the United States, a citizen of the State of California, and Clay Tallman, Commissioner of the General Land Office of the United States, a citizen of the State of Nevada, as a cause of which this court has original jurisdiction under section 2, article III, of the Constitution of the United States, and that upon the filing thereof a subpœna issue, as provided by rule 12 of the Rules of Practice in Equity.

THE STATE OF NEW MEXICO,
By FRANK W. CLANCY,
Attorney General.

IN THE SUPREME COURT OF THE UNITED STATES.

Original, No. —.

THE STATE OF NEW MEXICO

vs.

FRANKLIN K. LANE, *Secretary of the Interior, and* CLAY TALLMAN, *Commissioner of the General Land Office.*

Bill for Injunction and Equitable Relief.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of New Mexico, by its Attorney General, Frank W. Clancy, and its Commissioner of Public Lands, Robert P. Ervien, by leave of the court first had and obtained, files this its bill of complaint against Franklin K. Lane, Secretary of the Interior of the United States, and Clay Tallman, Commissioner of the General Land Office of the United States. Thereupon your orator complains and shows to the court as follows:

I.

The State of New Mexico is one of the States of the American Union and is a sovereign State of the United States. The defendant Franklin K. Lane is Secretary of the Interior of the United States and is a citizen of the State of California, and the defendant Clay Tallman is the Commissioner of the General Land Office and is a citizen of the State of Nevada.

II.

By section 1 of an act approved June 21, 1898 (chap. 489, 30 Stats., 484), entitled "An act to make certain grants of land to the Territory of New Mexico, and for other pur-

poses," Congress made a grant of lands to said Territory in the following words:

> "That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided: *Provided*, That the sixteenth, and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this act; but such reservations shall be subject to the indemnity provisions of this act."

III.

By section 6 of an act approved June 20, 1910 (chap. 310, 36 Stats., 557, 561), entitled "An act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States," Congress made a grant of lands to the future State of New Mexico in the following words:

> "That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this act are hereby granted to the said State for the support of common schools."

By section 10 of said act (p. 563) it was provided:

> "That it is hereby declared that all lands hereby granted, including those which, having been hereto-

fore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust," etc.

And by section 12 of said act (p. 565) it was provided:

"That all grants of lands heretofore made by any act of Congress to said Territory, except to the extent modified or repealed by this act, are hereby ratified and confirmed to said State, subject to the provisions of this act."

IV.

By proclamation of the President of the United States dated January 6, 1912 (Proclamations of the President of the United States, 1912, p. 47), the State of New Mexico was admitted into the Union on an equal footing with the other States of the American Union.

So that the present beneficiary of said school-land grant of June 21, 1898, is your orator, the present State of New Mexico.

V.

Said school-land grant of June 21, 1898, to the Territory of New Mexico was, and has always been held to have been, a grant *in præsenti*, under which absolute title in fee to all sections 16 and 36 in the Territory which were, at that date, identified by the public surveys passed to and became immediately vested in said Territory at the date of the approval of said act, unless at said date the same were *known* to be mineral in character, and no certificate or patent was necessary to pass such absolute title in fee to said Territory.

Thus, in *Territory of New Mexico*, 31 L. D., 389, 391, decided by the Secretary of the Interior under date of July 26, 1902, it was held:

"The grant by section 1 of this act (act of June 21, 1898) was and is in terms a grant *in præsenti*,

and upon the approval of the act the absolute title in fee to all sections 16 and 36 in the Territory which were identified by the public surveys became immediately vested in the Territory, in so far as such sections embraced lands not then *known* to be otherwise than of the character subject to the grant."

VI.

Township 15 N. of R. 18 W., New Mexico principal meridian, then within the Territory of New Mexico and now within the limits of the State of New Mexico, was surveyed by the United States Government in 1881, the township lines having been run in June and July of that year, and the subdivisional lines of the township having been run beginning July 26 and ending July 31, 1881. Said survey was approved by the Surveyor General of New Mexico on November 30, 1881, and the township plat was filed in the local land office within the district in which said township was then embraced, and the land thereupon became subject to disposal on July 21, 1882, which was many years prior to the date of said school-land grant of June 21, 1898, set out in paragraph II of this bill.

Said section 16 in said township at the date of said school-land grant had not theretofore been sold or otherwise disposed of by or under the authority of any act of Congress, and the same was not embraced in any Indian, military, or other reservation of any character. So that when said school-land grant of June 21, 1898, was made the said section 16 of said township 15 north of range 18 west, having been identified by said survey, title in fee thereto passed to and became immediately vested in said Territory, unless the same was then *known* to contain mineral.

VII.

The S. W. ¼ N. E. ¼ of section 16, in said T. 15 N., R. 18 W., in New Mexico, at the date of said school-land grant

of June 21, 1898, was not *known* to be mineral in character and was not then *known* coal land, under the interpretation of the coal-land law which had uniformly prevailed ever since the enactment of the coal-land law in that, at said date, there had never been any attempt on the part of anyone to discover and develop any coal upon said tract, and no coal had been produced or extracted therefrom, and there was no production of coal from said tract until in 1911, which was about 13 years after the absolute title in fee thereto had vested in said Territory.

VIII.

The uniform interpretation of the coal-land law from the beginning of the administration of that law up until the promulgation of the instructions of October 26, 1905, reported in 34 L. D., page 199, was that, in order to establish the fact that such lands are "known coal lands," within the meaning of the coal-land law, there must have been a prior actual production of coal from such lands, of a merchantable quality and commercially valuable, and that, even to show that there is a vein of coal thereon, is not enough to characterize the land as coal land. Thus, in the early case of *Kings County vs. Alexander,* 5 L. D., 126, 127, decided September 4, 1886, which was a case involving the construction of the *coal*-land law, Mr. Secretary Lamar, citing many earlier departmental and court decisions as authority, said:

> "It is not enough to show that neighboring or adjoining lands are mineral in character, and that the land in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from *actual production of mineral,* and not from a theory that the lands may hereafter produce it."

The law as thus laid down in said case of *Kings County vs. Alexander, supra,* that, in order to establish land as coal land,

there must have been an actual production of coal therefrom, and that such fact could not be established from theory, was expressly approved in *Savage vs. Boynton,* 12 L. D., 612, 615, decided June 10, 1891; in *Warren vs. State of Colorado,* 14 L. D., 681, 684, decided June 22, 1892; in *Hamilton vs. Anderson,* 19 L. D., 168, 169, decided October 9, 1894, where the Secretary said:

> "The rule of the Department undoubtedly is that land must appear mineral in character 'as a present fact' and from *actual production of mineral;*"

in *McWilliams vs. Green River Coal Association,* 23 L. D., 127, 130, decided July 13, 1896; and as late as March 11, 1905, which was seven years after the school-land grant to the Territory of New Mexico took effect and became absolutely vested in fee in said Territory, Mr. Secretary Hitchcock, in the unreported case of *Robert Dwyer vs. Ernest H. Schwiethale,* specifically declared, in regard to coal land, or lands alleged to contain coal, that—

> "It is not enough to characterize land as chiefly valuable for its deposits of coal, to show that there is a *vein of coal thereon;* but it must affirmatively appear from the evidence that the coal exists in such quantity and quality as to make the land more valuable on that account than for other purposes."

The rule of the Department as to what was meant by "known coal land," or what was meant by the phrase "known mines," or words of similar import, was all that time in harmony with the decisions of the courts on the same subject, as shown by the following decisions: *Deffeback vs. Hawke,* 115 U. S., 393, decided November 16, 1885; *Colorado Coal Company vs. United States,* 123 U. S., 307, decided November 27, 1887; and the same was expressly approved by the Supreme Court of the United States in the case of *Davis's Administrator vs. Weibbold,* 139 U. S., 507, 522, decided April 6, 1891, where many of the departmental decisions on

the subject were cited and referred to with approval. So that the uniform rule of departmental construction, approved by the Supreme Court, was, until long after the said school-land grant to the Territory of New Mexico took effect and became vested in fee in the Territory, that no land could be held to be "known coal land" unless there had been an actual production of coal therefrom. And in no reported case, either in the courts or in the Interior Department, had it ever been held, up to the date of said school-land grant or for many years thereafter, that land was "known coal land" unless there had been a mine opened thereon and an actual production of coal therefrom of such quantity and quality as to make the land more valuable on that account than for other purposes.

IX.

And your orator avers, therefore, that said long, uninterrupted, and uniform construction of grants of the character of said school-land grant of June 21, 1898, to the Territory of New Mexico, continued as it was for many years after said grant became absolutely vested in fee in said Territory, *became a rule of property,* on which parties purchasing school lands from said Territory or your orator had the right to rely, and of which said Territory and your orator, the successor in title and interest of said Territory, cannot be deprived by any subsequently adopted change in the construction of the law. Title in fee to said school lands so granted by said act of June 21, 1898, having once vested, as it did, under the law as construed and interpreted at said date, could not be divested by a simple change in the construction and interpretation of the same law.

And such uniform construction of such grants for so many years existing at the date of said school-land grant of June 21, 1898, being known to Congress when it enacted said statute, was adopted by Congress, and became the rule of construction for the future in the administration of said

school-land grant; and the acceptance of said school-land grant by the Territory of New Mexico became an executed contract between it and the United States, to be construed and interpreted according to its terms as interpreted and understood at the date of said grant. So that, as no coal mine had ever been opened on said S. W. ¼ N. E. ¼ of said section 16, or coal extracted from said tract, at the date of said school-land grant of June 21, 1898, or for many years thereafter, the absolute title in fee thereto passed to and became vested in the Territory of New Mexico and is now the property of your orator, the successor in title and interest of said Territory.

X.

Now, your orator avers that notwithstanding the fact that title to said forty-acre tract had become vested in fee in said Territory at the date of said school-land grant of June 21, 1898, and could not be divested by anything occurring thereafter, nevertheless the Commissioner of the General Land Office and the Secretary of the Interior have held and decided that a coal-land locator of said S. W. ¼ of the N. E. ¼ of said section 16, whose claim was filed in 1911, is entitled to have a patent for said tract, and those officials are about to issue a patent for said tract to said coal-land applicant, as will be hereafter shown in this bill.

XI.

Said township on July 27, 1906, was withdrawn from coal filing and entry by the Secretary of the Interior, and all of said section 16 thereof was subsequently classified by the Geological Survey on June 15, 1907, as coal land at the minimum price. Such classification, however, was subsequently declared erroneous by one L. A. Gillette, a special agent of the General Land Office, and the Director of the Geological Survey afterwards expressed an opinion that the

E. ½ and the S. W. ¼ N. E. ¼ of said section 16 were perhaps non-coal in character, as will be more fully shown hereafter in this bill.

XII.

On May 12, 1911, one George A. Keepers, Jr., filed in the local land office at Santa Fe, New Mexico, within which district said township is situated, a coal declaratory statement under section 2348 of the Revised Statutes of the United States for the E. ½ N. E. ¼ and S. W. ¼ N. E. ¼ of said section 16, township 15 north, of range 18 west, and three days thereafter, to wit, on May 15, 1911, he applied to purchase the same as coal land under section 2347 of the Revised Statutes, and due publication of notice thereof, as provided by the mining laws and regulations of the Interior Department, was duly had, beginning May 19, 1911, and ending June 16, 1911. Within said period of publication a protest by certain citizens of that vicinity was filed against said application, and the Territory of New Mexico, by its Commissioner of Public Lands, intervened, claiming that the lands embraced in said coal-land application belonged to the Territory under said school-land grant of June 21, 1898, on the ground that the same were not coal lands and were not *known* to be coal lands at the date of said grant. Said protests were duly transmitted to the Commissioner of the General Land Office for appropriate action, and on August 23, 1911, by letter "N" addressed to the local officers at Santa Fe, New Mexico, the Commissioner directed a hearing to determine the character of the lands embraced in said coal-land application of said Keepers, including the S. W. ¼ N. E. ¼ of said section 16. In said letter the Commissioner said:

> "On July 15, 1907, you were advised of the classification of these tracts, with others in the township, as coal land subject to sale under the coal-land law at the minimum price. There has been no subsequent

withdrawal or classification of the tracts herein applied for.

"It appears that a bill, H. R. 21892, having been introduced in Congress to authorize the Territory of New Mexico to dispose of certain land in section 16, T. 15 N., R. 18 W., to the town of Gallup, New Mexico, this office ordered an investigation by a special agent to ascertain the coal or non-coal character of the land in section 16, embraced in said bill. On April 8, 1910, the Chief of Field Division submitted a report of an examination of the section by L. A. Gillett, practical miner, in which he reported the N. W. ¼ N. E. ¼ and the W. ½ sec. 76, T. 15 N., R. 18 W., as coal land, and the remainder of the section as non-coal in character.

"On June 11, 1911, the report of Special Agent Gillett was transmitted to the Director of the Geological Survey, with request for a report as to the coal character of the E. ½ N. E. ¼ and S. W. ¼ N. E. ¼ sec. 16, T. 15 N., R. 18 W., the tracts embraced in this application. On July 21, 1911, the Director returned said report, and stated, after reviewing the same, that—

" 'The evidence at present at hand seems to indicate that Mr. Gillett is correct in his non-coal classification of the S. E. ¼ N. E. ¼, and possibly also of the N. E. ¼ N. E. ¼, and S. W. ¼ N. E. ¼. If he can furnish further information with regard to the questions herein raised it may be possible to make a definite classification of these tracts.'

"Inasmuch as these lands have been classified as coal land, and are now embraced in a pending application under the coal-land law, a hearing may be allowed to determine their true character."

In the meantime a bill (H. R. 21892) having been introduced in Congress authorizing the Territory of New Mexico to sell and transfer to the town of Gallup the three 40-acre subdivisions which were subsequently applied for as coal land by said Keepers, hereinabove described, on June 15, 1911, the Commissioner of the General Land Office wrote

to Hon. W. H. Andrews, then the Delegate in Congress from said Territory, in which he said:

> "In order to report intelligently upon said bill (H. R. 21892) an investigation was ordered by a special agent of the General Land Office relative to the coal or non-coal character of the land. April 8, 1910, the agent made his report from which it appears that the land herein described is non-coal in character.
>
> "May 27, 1910, in reporting on said bill, it was stated 'that this Department has no objection to offer to the enactment of a law authorizing the Territory to sell for the purposes indicated the E. ½ N. E. ¼ and S. W. ¼ N. E. ¼ of said section.' * * *
>
> "In view of the fact that the Geological Survey has classified the entire township as coal in character without special reference to the land in question, while a special agent of the General Land Office has reported these tracts to be non-coal in character, the Geological Survey will be called upon for a report with reference to the character of these particular tracts."

XIII.

Now, your orator, conceding, as a general proposition, that the Commissioner of the General Land Office had the right and authority to determine the question as to whether said S. W. ¼ N. E. ¼ of said section 16 was *known* coal land at the date of said school-land grant of June 21, 1898, nevertheless avers that in such determination said official was restricted, in view of the construction of the coal-land law then prevailing and the rule of property thereby established, to ascertaining only the single fact as to whether, at the date of said grant, a mine had been opened on said land or coal produced therefrom, and that that was the sole question he had any jurisdiction to investigate either by special agent or on a hearing under the regulations of the Department; and, therefore, when, in his said letter "N" of August 23, 1911, referred to in paragraph XII of this bill, he undertook and directed a hearing "to determine their true character," mean-

ing thereby to determine their character at the date of said hearing, he was exceeding his authority, his jurisdiction being limited merely to the ascertainment of their *known* character at the date of said grant of June 21, 1898, that is, as to whether, at said last-mentioned date, there had been any coal mine opened on said land or any production or extraction of coal therefrom.

XIV.

Nevertheless a hearing was thereafter had pursuant to said order of the Commissioner of the General Land Office dated August 23, 1911, at which much testimony was taken, largely addressed to the geological conditions of the lands embraced by such order, including said S. W. ¼ of the N. E. ¼ of said section 16, and no testimony was adduced thereat showing that any coal whatever had ever been produced or extracted from said S. W. ¼ of the N. E. ¼ of said section 16 prior to the date of said school-land grant of June 21, 1898, or for many years thereafter and up until the year 1911. As a result of said hearing the local officers did not find that any coal had ever been produced or extracted from said S. W. ¼ of the N. E. ¼ of said section 16, or that any coal of a merchantable quantity and commercially valuable had ever been produced from any of the lands involved in said hearing, and that there was lack of coal development on the S. W. ¼ of the N. E. ¼ of said section 16 at and prior to June 21, 1898, the date of said school-land grant to the Territory of New Mexico; but, nevertheless, they decided, upon developments made subsequently to said school-land grant, and on other matters subsequently occurring, including the subsequent classification of the land as coal land by the Geological Survey in 1907, that said tract contained coal at the date of said school-land grant (though it had not been developed), and was for that reason *known*

coal land at the date of said school-land grant. On this point the local officers said:

> "As to the facts known prior to June 21, 1898, relative to the existence of coal on this tract, the evidence submitted at the hearings had, establishes in our opinion that the land was known to have coal several years prior to June 21, 1898; * * * that all three forties have been classified as coal land by the Geological Survey, and that, regardless of lack of development thereon prior to June 21, 1898, subsequent developments have established clearly that the S. W. ¼ N. E. ¼ of said section contains a vein of coal several feet in width, and workable."

Upon appeal the Commissioner of the General Land Office, by decision of December 18, 1913, upon the same evidence before the local officers, which did not show that there had ever been any coal production from said section 16 at or prior to the date of said school-land grant of June 21, 1898, and notwithstanding the fact that in and by his said letters of June 15, 1911, and August 23, 1911, mentioned in paragraph XII of this bill, he had declared that the lands in question were not *known* to be coal in character, but had been found by a special agent of his office to be non-coal in character even at said dates, nevertheless affirmed said decision of the local officers as respects said S. W. ¼ N. E. ¼ of said section 16, holding, as a conclusion of law, that, notwithstanding there had been no coal production from said S. W. ¼ N. E. ¼ of said section 16, but from geological conditions only, said tract of land was *known* coal land at the date of said school-land grant of June 21, 1898. In the course of said decision, referring to said S. W. ¼ N. E. ¼ of said section 16, the Commissioner said:

> "As to the S. W. ¼ N. E. ¼, it is clear that a portion of the subdivision is underlain by the bed (Black Diamond coal bed), but the area thus underlain was the subject of conflicting testimony at the hearing, the estimates ranging from about seven

acres to the entire forty. After careful consideration, however, this office sees no reason why it should not accept the estimate of twenty-seven acres, situated mostly in the western portion."

* * * * * * *

"In the opinion of this office, there seems to be little doubt that the entire section 16, herein involved was at the date of the passage of the act *considered*" (not "known") "to be coal in character,"

for the reason that—

"The Gallup coal field is one of the oldest in the State of New Mexico and, among others, the Rocky Cliff, Gallup and Weaver mines, in the immediate vicinity of the land herein, have for years been actively operated;"

and for the additional reason that numerous coal declaratory statements therein specifically mentioned had been made on said section 16, none of which, however, were ever perfected into an entry, but all of which had been abandoned; for

"Although these declaratory statements were not perfected into entries, many other coal entries, beginning as early as 1884, have been made in the immediate vicinity. Odd-numbered sections in the township were selected in 1887 as railroad land; S. E. ¼ sec. 16 was, in 1891, entered under the preemption laws, but with this exception, practically all the remainder of section 16 and also practically all of the cornering even-numbered section 10 have from time to time been purchased as coal land. Situated in a coal field, surrounded by operative coal mines, and by land purchased as coal land, it would be idle to say that the tracts herein were not generally regarded as being underlain with coal.

"It is, therefore, hereby held (as a conclusion of law from said stated facts) that S. W. ¼ N. E. ¼ and N. E. ¼ N. E. ¼ are coal land, and were, June 21, 1898, known to be such."

No finding was made in said decision, however, that any coal had been produced or extracted from said S. W. ¼ N. E. ¼ of said section 16 at the date of said school-land grant or prior thereto, much less that if there had been any such coal production the same was of merchantable quality and commercially valuable, which was the essential fact necessary for the Commissioner to find in order to hold, as a conclusion of law, as he did, that said S. W. ¼ N. E. ¼ of said section 16 was *known* to be coal land at the date of said school-land grant of June 21, 1898, and no such finding could have been made upon the evidence in the record which, upon that point, was silent. A copy of said decision is hereto attached, marked Exhibit "A," and made a part of this bill.

XV.

An appeal from said decision in respect of said S. W. ¼ N. E. ¼ of said section 16 was duly taken by your orator, the State of New Mexico, to the Secretary of the Interior and, by decision of October 4, 1915, the honorable First Assistant Secretary of the Interior correctly decided that said school-land grant of June 21, 1898, was a grant *in præsenti*, and that title to the lands so granted vested absolutely in the Territory, now State, of New Mexico, upon the approval of said act, unless they were *known* at that date to be valuable on account of coal, citing numerous authorities. Said decision then found as a fact that—

> "The land in controversy was not returned as coal land by the surveyor and it does not appear that at the date of the grant any valid claim was being asserted thereto under the coal-land laws. It is true that as early as 1883, and thereafter, coal declaratory statements had from time to time been filed on the N. E. ¼ of said section 16, and on January 5, 1898, a coal filing was made therefor by one Katherine Leaden. These filings, however, were all abandoned and it does not appear that any attempt was made on the part of Leaden to open or improve a mine of coal

> on the land or any portion thereof or to purchase the land under the coal-land laws. Presumptively, therefore, the title to the land passed to the Territory of New Mexico at the date of the grant, and this presumption can only be overcome by the submission of satisfactory proof that the land was *known* to be coal in character at that time."

Then, commenting on the testimony taken at said hearing regarding geological conditions affecting said S. W. ¼ N. E. ¼ of said section 16, the honorable First Assistant Secretary, in said decision, found and said:

> "The Black Diamond bed, which is approximately five feet thick, outcrops or is otherwise exposed in the extreme northwest corner of the N. E. ¼ N. E. ¼, which it underlies to the extent of something less than an acre, and also in the southeast portion of the S. W. ¼ N. E. ¼. The easterly line of the crop between these points is concealed by a mass of wash and detritus to a depth of from 90 to 150 feet, but is shown to extend in a northerly and southerly direction through the eastern portion of the S. W. ¼ N. E. ¼. These disclosures antedate the grant to the State and establish the existence of the bed within the limits of the S. W. ¼ N. E. ¼ prior thereto."

These were the only specific *findings of fact* made by the honorable First Assistant Secretary of the Interior in his said decision of October 4, 1915, regarding the *known* coal or non-coal character of said S. W. ¼ of N. E. ¼ of said section 16 at the date of said school-land grant; but, nevertheless, upon said findings of fact, and those only, said decision declared, as a conclusion of law, that—

> "As to the S. W. ¼ N. E. ¼, the evidence, in the opinion of the Department, fully warrants the conclusion of the local officers and the Commissioner that the land is coal in character and was known to be such at the date of the grant."

No finding was made in said decision that, at the date of said school-land grant of June 21, 1898, there had been any coal production or extraction from said S. W. ¼ of the N. E. ¼ of said section 16, and no such finding could have been made upon the record, because there was no evidence therein even tending to show such a fact so as to impress said tract with a *known* coal character within the meaning of the law as then understood and interpreted; and the only fact relied upon in said decision to support the conclusion that said tract was *known* coal land at the date of said school-land grant was that certain "disclosures" which *now*, not *then*, indicate that the Black Diamond coal bed underlies a portion of said tract, a fact which, even if it had been *known* at the date of said grant, would not have been sufficient, under the law as at that date construed and interpreted, to render said tract *known* coal land. So that said conclusion in the decision of the honorable First Assistant Secretary of the Interior of October 4, 1915, that said S. W. ¼ of the N. E. ¼ of section 16 was "known" to be coal land at the date of said school-land grant was purely an arbitrary one and an unwarranted exercise of his power and authority, was not based upon any evidence in the record, and was a *non sequitur* from the findings of fact therein made; and he was without authority or jurisdiction to announce such a conclusion upon said findings of fact and the evidence in the record. Such conclusion, therefore, was wholly *ultra vires* and without any authority of law to support it, and was an attempted denial of the vested right of your orator to said tract of land granted to it by a law of Congress. A copy of said decision of the honorable First Assistant Secretary of the Interior is hereto attached, marked Exhibit "B," and made a part of this bill.

XVI.

Your orator, the State of New Mexico, by its authorized attorney of record, within the time permitted by the Rules

of Practice of the Interior Department, filed a motion for rehearing of said decision of the honorable First Assistant Secretary of the Interior, accompanying the same with elaborate argument in its support, but the same was denied by said official by decision of December 24, 1915, on the ground that no new facts had been brought forward and that all the matters submitted in said motion and argument had already received attention. A copy of said motion for rehearing and the brief and argument in its support, and also a copy of said last decision, are hereto attached, marked Exhibits "C" and "D," respectively, and made a part of this bill.

XVII.

Thereupon, by letter of January 5, 1916, addressed to the local officers at Santa Fe, the honorable Assistant Commissioner of the General Land Office promulgated the said decision of the honorable First Assistant Secretary of the Interior and canceled said coal-land application of said Keepers as to the entire E. ½ of the N. E. ¼ of said section 16, and declared that—

> "as to S. W. ¼ N. E. ¼, sec. 16, action will now be promptly taken upon the final proof heretofore submitted, and if found satisfactory, recommendation will be made that the existing executive withdrawal be revoked."

A copy of said letter of January 5, 1916, is hereto attached, marked Exhibit "E," and made a part of this bill.

XVIII.

Thereupon, in execution of said letter of the honorable Assistant Commissioner of the General Land Office of January 5, 1916, mentioned in paragraph XVII of this bill, the Commissioner of the General Land Office, by letter "N" of February 17, 1916, addressed to the local officers at Santa

Fe, New Mexico, directed those officers, "in the absence of objection not known to this office," to issue final certificate to said Keepers for said S. W. ¼ of N. E. ¼ of said section 16. A copy of said letter is hereto attached marked Exhibit "F," and made a part of this bill.

XIX.

Now your orator avers that when said final certificate shall be issued, as it undoubtedly has been, and upon its receipt at the General Land Office, the officials thereof, following the regulations of the Interior Department in such cases made and provided, will at once proceed to issue a patent to said Keepers for said S. W. ¼ of the N. E. ¼ of said section 16, unless restrained by this honorable court in the meantime, which said tract is owned by and belongs to your orator as a part of its school-land grant which was vested immediately in fee in the Terrtory of New Mexico, at the date of said school-land grant of June 21, 1898, to which right and title your orator has succeeded, as aforesaid, and such patent, if issued to said Keepers, will be a cloud upon the title of your orator to said tract, being an attempt, unlawfully, to deprive your orator of its title in fee simple thereto.

Wherefore, in view of the premises, your orator prays:

1. That your honors will grant unto your orator a writ of subpœna, issuing out of and under the seal of this honorable court, directed to the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, and each of them, requiring and commanding them, and each of them, on a certain day, to appear and answer, but not under oath, the exigencies of this bill of complaint.

2. That this honorable court will adjudge and decree that the title to said S. W. ¼ of the N. E. ¼ of said section 16, in township 15 north, of range 18 west, New Mexico prin-

cipal meridian, was immediately vested in fee in the Territory of New Mexico at the date of said school-land grant of June 21, 1898, and has become vested in fee in your orator, as the successor in title and interest of said Territory.

3. That the title to said S. W. ¼ of said N. E. ¼ of said section 16 having so vested in fee in the Territory of New Mexico, and being now so vested in your orator, the honorable Commissioner of the General Land Office and the honorable Secretary of the Interior, the defendants herein, have not since the date of said school-land grant, and have not now, any power or authority to interfere with your orator's fee-simple title to said S. W. ¼ of the N. E. ¼ of said section 16.

4. That it may please the court to grant to your orator a writ of injunction restraining the defendants, and each of them, from executing their said former orders and decisions, and from issuing a patent to said Keepers for said S. W. ¼ of said N. E. ¼ of said section 16, and from in any way clouding the title of your orator to said tract, to the detriment and harm of your orator.

5. That your honors will grant unto your orator such other and further relief as equity and the nature of the case may require.

THE STATE OF NEW MEXICO,
By FRANK W. CLANCY,
Attorney General, and
ROBERT P. ERVIEN,
State Commissioner of Public Lands.

HARVEY M. FRIEND,
Counsel for the State of New Mexico.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Personally appeared before me, the undersigned authority, Frank W. Clancy, who, being duly sworn in the foregoing case, on his oath says that he is the Attorney General of the State of New Mexico; that he has read the foregoing bill of complaint, and that the same is true to the best of his knowledge, information, and belief.

—— ——.

Subscribed and sworn to before me this — day of March, A. D. 1916.

—— ——,
Notary Public.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Personally appeared before me, the undersigned authority, Robert P. Ervien, who, being duly sworn in the foregoing case, on his oath says that he is the State Commissioner of Public Lands of the State of New Mexico; that he has read the foregoing bill of complaint, and that the same is true to the best of his knowledge, information, and belief.

—— ——.

Subscribed and sworn to before me this — day of March, A. D. 1916.

—— ——,
Notary Public.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Personally appeared before me, the undersigned authority, William G. McDonald, who, being duly sworn in the

foregoing case, on his oath says that he is the Governor of the State of New Mexico, and as such requested and directed the filing of said bill therein; that the facts therein stated are true to the best of his knowledge, information, and belief.

——— ———.

Subscribed and sworn to before me this — day of March, A. D. 1916.

——— ———.

EXHIBIT A.

In reply please refer to Santa Fe 015309 "N" JAW.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *December* 18, 1913.

Address only the Commisioner of the General Land Office.

JES SULLIVAN (alias JOSEPH TILLIAN) et al.
v.
GEORGE A. KEEPERS, JR.

Adjudication Concerning the Character of Land.

REGISTER AND RECEIVER,
Santa Fe, New Mexico.

SIRS: May 12, 1911, George A. Keepers, Jr., filed in your office, a coal declaratory statement, embracing E. ½ N. E. ¼ and S. W. ¼ N. E. ¼, Sec. 16, T. 15 N., R. 18 W., N. M. M.; three days thereafter, under section 2347 of the Revised Statutes, he applied to purchase the same, and the customary publication of notice followed.

During the period of publication (May 19, 1911, to June 16, 1911), the copy of the notice of publication sent the chief of field division was returned endorsed "no protest;" the copy sent the representative of the State of New Mexico was returned with a signed endorsement, as follows:

> "We waive all rights in the matter as the land could not become the property of the Territory until 1898 and as it was known as coal land previous to that date we lost our rights."

June 29, 1911, Joseph Tillian, Alejandro Montoya and Pedro M. Pino filed in your office, a verified protest asserting, generally, that the land was non-coal in character; a mistake in regard to the signature of the first-named has resulted in the designation heretofore of Jes Sullivan, in the title of the case, and for the purposes of identification the designation will be retained; July 29, 1911, the State of New Mexico, through its commissioner of public lands, filed a similar protest; August 7, 1911, a protest was filed by the field service.

August 23, 1911, this office directed a hearing to determine the character of the land. As a result of these directions, you ordered a hearing; March 11, 1912, and on following days, before a United States Commissioner at Gallup, New Mexico, and April 24, 1912, and on following days, before you, testimony was, accordingly, submitted; various testimony was likewise given upon deposition. At these hearings, both the protestants and the protestees appeared in person or by counsel, and appearance was also made on the part of the State of New Mexico.

July 15, 1912, you rendered decision, holding the land to be coal in character. Of this decision, the various parties in interest received notice, August 8, 1912. August 27, 1912, an appeal was filed in behalf of the protestants and of the State. In addition, in support and in contravention of the appeal, numerous and elaborate briefs and arguments have been filed, both by local and by resident counsel.

It further appears, in regard to the past and present status of the land, that, July 27, 1906, the said section 16 was withdrawn from all forms of entry, under the public land laws; that, December 17, 1906, this withdrawal was limited to coal entry only; and that, June 15, 1907, the land was classified as coal land at the minimum price, which classification is still in force.

Prior to an examination of the testimony submitted, it may be said that the land in controversy adjoins immedi-

ately on the north the townsite of Gallup, New Mexico. The result of this has been that from time to time a large number of houses have been built on the land, although the builders were without title. The land, therefore, is not without both present and prospective value for townsite purposes. The case has been bitterly and vigorously contested and charges have been freely made, on the one side, that the land is sought only because of its situation, adjoining the townsite, and, on the other, in order to perpetuate a corporate coal monopoly. The issue before this office, however, is simply whether, May 12, 1911, the date of the protestee's application, the land was subject to entry as coal land by the protestee.

In a consideration of the testimony, the first question to be determined is the locus on the land of the eastern boundary of the Black Diamond coal bed, a recognized and workable bed of the Durango-Gallup coal field, occurring in the lower part of the Mesaverde (Cretaceous) geological formation. This boundary may, in N. ½ N. E. ¼, Sec. 16, be actually observed, because of outcroppings, but, in S. W. ¼ N. E. ¼, it is hidden by wash and its course must be inferred. It seems clear that the bed barely extends upon the edge of N. E. ¼ N. E. ¼, and, because of this meagre area, it may be deemed immaterial, in connection with that subdivision. In like fashion, it is clear, from the dip of the bed observed in W. ½ N. E. ¼, that the bed does not underlie any part of S. E. ¼ N. E. ¼.

As to S. W. ¼ N. E. ¼, it is also clear that a portion of the subdivision is underlain by the bed, but the area thus underlain was the subject of conflicting testimony at the hearing, the estimates ranging from about seven acres to the entire forty. After careful consideration, however, this office sees no reason why it should not accept the estimate of twenty-seven acres, situated mostly in the western portion, given by the witness Gillette and agreed to by R. C. Hills, two of the technical witnesses of the protestants.

The Black Diamond bed having been eliminated, there remain to be considered any coal beds which in the field may be of lower stratigraphical occurrence. It is, undoubtedly, true that in the vicinity of the land, there have been observed, in the lower part of the Mesaverde formation, such beds, one of which, namely, the Otero bed, appears to have a recognized identity and appears, at places, to be of workable thickness and quality.

As to N. E. ¼ N. E. ¼, in this connection, it appears that, in its northeastern part, there is a mesa; the approach to the top of this mesa includes the greater part of the subdivision; in this approach, there are various coal outcroppings, coal openings or other evidences of the presence of coal. According to the map of the witness Gillette, three separate beds have been distinguished, in these evidences, one of which beds, undoubtedly, is to be identified as the Otero bed.

As to the character of these three beds, the testimony differed widely. The measurements of the beds, as shown on the map offered in behalf of the protestants, do not indicate beds of workable thickness, according to the ordinary standards by which the classifications of coal lands by the U. S. Geological Survey are governed, since the thickest appears to show only nineteen inches of good coal, separated by eight inches of shale. But testimony was also given that these beds *were* of workable thickness; extensive shafts and workings have been had in connection with them, even if no mine has been actively and profitably operated; there is considerable probability that with further development a better showing than the showing at the surface may be expected. On the whole, the preponderance of the testimony, so far as related to N. E. ¼ N. E. ¼, indicated that tract to be coal in character.

As regards S. E. ¼ N. E. ¼, a small portion of the northeast corner, according to the map of the witness Gillette, in like fashion as N. E. ¼ N. E. ¼, is underlain with at least one of the three beds underlying N. E. ¼ N. E.

¼. As regards the remainder of S. E. ¼ N. E. ¼, viewing all the testimony, the weight of the same is not so strong in the protestee's favor. Assuming the dip of the Black Diamond bed, at the west, to be fourteen degrees, and the strike to be in a westerly direction, as was testified; assuming the dip of one of the three lower beds—observable in N. E. ¼ N. E. ¼—to be five degrees, and the strike to be in a northerly direction, as was testified; and assuming further the highly probable fact that the three closely-related lower beds have a similar dip and strike, the extension of all four beds in the direction of the land would carry them considerably in the air above the land. The only remaining recourse, therefore, is to establish, so far as relates to the subdivision, the presence of coal beds, still other than the Black Diamond and the three observable in N. E. ¼ N. E. ¼. In favor of this, it may be said that it is not uncharacteristic of the occurrence of coal deposits that, interspersed with more important beds, "stringers" of coal may occur, and that "stringers," or thin beds, of unworkable thickness or quality at one point, may develop into workable thickness or quality at another point. Nor is it doubted that, if the coal-bearing Mesaverde formation, so far as it is to be found under the wash of S. E. ¼ N. E. ¼, be thoroughly explored, "stringers" might, possibly, be encountered. It is, moreover true that some testimony was given that, in borings, on S. E. ¼ N. E. ¼, coal has actually been found, but this testimony did not establish nor did it even suggest a bed of workable thickness and quality on the S. E. ¼ N. E. ¼, and was, in fact, counterbalanced by testimony submitted on behalf of the protestants to the effect that in nearby and deeper borings (apparently, exhausting the Mesaverde formation), no coal, even in the form of "stringers," or thin beds, had been found. Testimony was also given as to the outcroppings nearby, and inferentially, as to its extension under the land, of a certain pink or red sandstone, "the most distinguishing lithological feature of the district," but the widest effect that

may be attached to this is that, occurring above the sandstone and beneath the surface of the land, there is, in part, the coal-bearing Mesaverde formation, and, possibly, thin beds of coal. The mere presence of the sandstone, manifestly, is not evidence of the existence of a bed of workable quality or thickness. It should be added, perhaps, that it has not been overlooked in the geologic map submitted in behalf of the protestee, that the Black Diamond bed was located in the center of S. E. ¼ N. E. ¼, but as this location is at variance with the testimony of practically all the witnesses, it may be disregarded; it is to be noted, moreover, that the vertical section of the map made no reference to S. E. ¼ N. E. ¼.

On the whole, the preponderance of the testimony, so far as related to S. E. ¼ N. E. ¼, indicated that tract to be non-coal in character.

A second question arising in the case may then be considered. When not mineral in character, sections 16 and 36 in each township in the Territory of New Mexico were granted to the Territory by the act of June 21, 1898 (30 Stat., 484). However, if at the date of the passage of the act these sections were known to be mineral (or coal) in character, the grant did not take effect. In the opinion of this office there seems to be little doubt that the entire section 16 herein involved was at the date of the passage of the act considered to be coal in character.

The Gallup coal field is one of the oldest in the State of New Mexico and, among others, the Rocky Cliff, Gallup and Weaver mines, in the immediate vicinity of the land herein, have for years been actively operated. Aside from this proximity, it appears, from the records of this office, that, as early as 1883, coal declaratory statement No. 82 was filed for N. E. ¼, by the Gallup Coal and Iron Company. Subsequently, and prior to the date of the grant, numerous other declaratory statements were filed, embracing one or more of the subdivisions, including coal declaratory statement No. 621, for N. E. ¼ N. E. ¼, filed October 16, 1896, by Andrea Cesna, and canceled, March 28, 1898; in fact, at the date of

the making of the grant, N. E. ¼ was included in coal declaratory statement No. 659 of Mrs. Cathrine Leaden, filed January 5, 1898; April 1, 1899, Thomas Leaden filed coal declaratory statement No. 689, for N. E. ¼. These appear to have been, for one reason or another, abandoned; Leaden testified, at the hearing, "I started in with the intention of opening a mine there but it was rumored that the Fuel Company was going in to buy the old Crescent out and I knew if they got in here, they would freeze everybody else out that tried"; according to another witness, who had, April 16, 1894, filed coal declaratory statement No. 543, for N. E. ¼ N. E. ¼, "we knew of a better place and we moved to it."

But although these declaratory statements were not perfected into entries, many other coal entries, beginning as early as 1884, have been made in the immediate vicinity. Odd numbered sections in the township were selected in 1887 as railroad land; S. E. ¼, Sec. 16, was, in 1891, entered under the pre-emption laws, but with this exception, practically, all the remainder of section 16 and also practically all of the cornering even numbered section 10 have from time to time been purchased as coal land. Situated in a coal field, surrounded by operative coal mines, and by land purchased as coal land, it would be idle to say that the tracts herein were not generally regarded as being underlain with coal.

It is, therefore, hereby held that S. W. ¼ N. E. ¼ and N. E. ¼ N. E. ¼ are coal land, and were, June 21, 1898, known to be such, and that S. E. ¼ N. E. ¼ is non-coal land.

Your decision is, accordingly, to that extent modified. Of this, and of the right of appeal herefrom, within 30 days, to the Secretary of the Interior, you will notify all parties in interest.

Very respectfully,

CLAY TALLMAN,
Commissioner.

BOARD OF LAW REVIEW,
By W. B. PUGH.
12/13/18 McC.

EXHIBIT B.

Department of the Interior.

WASHINGTON, October 4, 1915.

D-26231.

JOSEPH TILLIAN et al.

v.

GEORGE A. KEEPERS, JR.

"N."

Santa Fe 015309.

Coal Land Application.

Modified.

Appeal from the General Land Office.

This case comes before the Department on cross-appeals by all the parties thereto from the decision of the Commissioner of the General Land Office of December 18, 1913, holding for rejection in part the coal land application, 015309, of George A. Keepers, Jr., for the E. ½ N. E. ¼, S. W. ¼, N. E. ¼, Sec. 16, T. 15 N., R. 18 W., N. M. P. M., Santa Fe land district, New Mexico.

On May 12, 1911, Keepers filed a coal declaratory statement for the land above described, and on May 15, 1911, presented therefor an application to purchase. June 29, 1911, Joseph Tillian, Alejandro Montoya and Pedro M. Pino filed in the local office a verified protest against the application, asserting generally that the land was non-coal in character, and that they had established residence thereon. On the same date the State of New Mexico, through its Com-

missioner of Public Lands, filed a protest against the application asserting the claim of the State under the act of June 21, 1898 (30 Stat., 484), granting to the Territory of New Mexico sections 16 and 36 for the support of common schools. On August 7, 1911, a protest was also filed against the application by the Field Service of the General Land Office.

Hearing was had on these several protests, and from the testimony adduced the local officers found that the land contained workable deposits of coal and was known to be coal in character prior to June 21, 1898, the date of the granting act, when the State's rights would have otherwise attached. On appeal this action of the local officers was in the decision complained of affirmed by the Commissioner as to the N. E. ¼ N. E. ¼, and S. W. ¼ N. E. ¼, but reversed as to the S. E. ¼ N. E. ¼.

The township embracing the land in question was surveyed in 1881, and the plat approved and accepted and filed in the local office the same year. In the field notes of the survey of the township under the heading "General description" the following notation appears:

Soil sandy, 2nd and 4th rate. A coal vein on line between Secs. 24 and 25 which is being worked at a point north in Sec. 24.

By section 1 of the act of June 21, 1898, *supra*, it was provided:

> "That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such in-

> demnity lands to be selected within said Territory in such manner as is hereinafter provided: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this Act; but such reservations shall be subject to the indemnity provisions of this act."

The grant established by this act is one *in præsenti* and except as to matters of minor importance, which do not affect the determination of this case, differs from grants of school lands to States only in the fact that it attached immediately upon the approval of the act as to lands theretofore identified by survey, whereas such grants to States did not become effective until the States were admitted into the Union. It is, therefore, governed and controlled by substantially the same rules as those applied to such grants to States upon their admission into the Union. Defining the right of a State under a grant of land for school purposes the Supreme Court in Cooper *v.* Roberts (18 How., 173) said at page 179:

> "The State of Michigan was admitted to the Union, with the unalterable condition 'that every section No. 16, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools.' We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance

> of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

To the same effect also is the decision of the Supreme Court in Beecher *v.* Wetherby (95 U. S., 517).

The particular tracts here in question had long been identified by approved survey at the date of the approval of the act of June 21, 1898. Under the principle above announced by the Supreme Court the legal title to said tracts vested absolutely in the Territory, now State of New Mexico, upon the approval of the act, unless they were known at that date to be valuable on account of coal (Mullan *v.* United States, 118 U. S., 271) or other mineral (Mining Company *v.* Consolidated Mining Company, 102 U. S., 167), it not appearing that they were otherwise excepted from the operation of the grant. See also, Doffeback *vs.* Hawke (115 U. S., 392); Colorado Coal and Iron Company *v.* United States (123 U. S., 307); Davis *v.* Weibbold (139 U. S., 507); Virginia Lode (7 L. D., 459); State of Colorado (6 L. D., 412); Abraham L. Miner (9 L. D., 408); Warren *et al. v.* State of Colorado (14 L. D., 681); Rice *v.* State of California (24 L. D., 14); State of Utah (32 L. D., 117). If, however, on the other hand, said tracts were at that date known to be valuable for mineral, title thereto did not pass under the grant but remained in the General Government and subject to its disposal under appropriate laws. Hydenfeldt *v.* Daney Co. (93 U. S., 634); State of South Dakota *v.* Trinity Gold Mining Company (34 L. D., 485); State of South Dakota *v.* Delicate (34 L. D., 717).

The land in controversy was not returned as coal land by the surveyor and it does not appear that at the date of the grant any valid claim was being asserted thereto under the coal land laws. It is true that as early as 1883, and thereafter coal declaratory statements had from time to time been filed on the N. E. ¼ of said Sec. 16, and on January 5, 1898, a coal filing was made therefor by one Catherine Leaden.

Those filings, however, were all abandoned and it does not appear that any attempt was made on the part of Leaden to open or improve a mine of coal on the land or any portion thereof or to purchase the land under the coal land laws. Presumptively, therefore, the title to the land passed to the Territory of New Mexico at the date of the grant, and this presumption can only be overcome by the submission of satisfactory proof that the land was known to be coal in character at that time. Charles L. Ostenfeldt (41 L. D., 265).

The land lies on the northerly flank of a valley carved out by the Rio Puerco (which flows in a southwesterly direction across the southeast corner of the S. E. ¼ N. E. ¼) and within the horizon of the lower coal subgroup of the lower Mesa Verde formation, whose base consists of a massive gray sandstone about 20 feet in thickness, and which in turn is underlain by a bed of what is known as red sandstone that is exposed at places a short distance to the east of the land and in the southeast corner of the S. E. ¼ N. E. ¼. Within said lower formation of the Mesa Verde are five coal beds designated locally (reading from top to bottom) as the Crown Point, Thatcher, Black Diamond, Otero and Talbot, the latter being about 30 or 35 feet above the red sandstone. The two beds first named have been eroded from the area, if they ever existed thereon, and the Otero and Talbot, which are exposed and have been operated in Sections 14 and 24, a mile and a half or more to the east of the land, are shown too thin in the direction of the land.

The Black Diamond bed, which is approximately five feet thick, outcrops or is otherwise exposed in the extreme northwest corner of the N. E. ¼ N. E. ¼, which it underlies to the extent of something less than an acre, and also in the southeast portion of the S. W. ¼ N. E. ¼. The easterly line of the crop between these points is concealed by a mass of wash and detritus to a depth of from 90 to 150 feet, but is shown to extend in a northerly and southerly direction

through the eastern portion of the S. W. ¼ N. E. ¼. These disclosures antedate the grant to the State and establish the existence of the bed within the limits of the S. W. ¼ N. E. ¼ prior thereto. The bed dips to the west, however, and hence does not underlie any portion of the S. E. ¼ N. E. ¼, nor a sufficient portion of the N. E. ¼ N. E. ¼ to impress that subdivision with any value on account of its presence there.

On a south facing escarpment of a mesa occupying the northern portion of the N. E. ¼ N. E. ¼ are exposed three beds designated by witnesses for the protestants as Nos. 2, 3 and 4. The uppermost of these beds, the No. 2, is situated stratigraphically about 40 feet below the Black Diamond horizon and underlies the northerly portion of the N. E. ¼ N. E. ¼ to the extent of 10 or 12 acres, and dips to the north and west. On this bed a prospecting tunnel about 145 feet in length was driven in 1894 by one Edward Quinn, and the coal removed in its excavation was disposed of to residents of the town of Gallup which adjoins the land on the south. According to the testimony of Quinn, the opening was abandoned in 1894 for the reason that he struck a fault which cut off or otherwise interfered with the mining of the coal, and also because he concluded to try his fortune at another place in the vicinity of the land where there was a thicker bed of coal. This witness gives the thickness of the bed disclosed in the tunnel as 22 inches. It is testified, however, by Leslie E. Gillett, a geologist employed as a mineral inspector by the General Land Office, and who has had much experience in the examination of coal lands in the Gallup coal fields, wherein the land is situated, that a careful measurement made by him of the bed showed the following section:

Sandstone, shale roof;
Black shale four inches;
Coal eight inches;
Shale eight inches;

Coal eleven inches;
Shale one inch;
Very nearly coal seven inches, not workable;
Black shale two inches;
Shale Floor.

It is also shown that near the face of the tunnel there is a roll which has reduced the thickness of the coal to one foot, and that the shale bed had also increased in thickness. This, it is testified, is probably the equivalent of the Otero bed, which is shown to contain three feet two inches of coal in section 14. The No. 3 bed lies stratigraphically about 25 feet below No. 2. It is shown to consist of 15 feet of shale containing three seams of dirty coal, each 6 inches in thickness, separated from one another by bands of earth shale. The uncontroverted testimony is to the effect that this bed is valueless for coal mining purposes. Underlying the latter bed at a depth of about 75 feet below the horizon of the Black Diamond, is the No. 4 bed, which is well exposed at an opening a few feet to the east of the east line of the N. E. ¼ N. E. ¼. Measurements of this bed, made by Gillett at that opening, showed the following section:

Black shale roof;
Slightly carboniferous shale 7 inches;
Coal 5 inches;
Shale 1 foot;
Coal 8 inches;
Very dirty coal unfit to use 7 inches;
Shale 2 inches;
Floor.

This bed dips to the northwest and underlies about 30 acres of the N. E. ¼ N. E. ¼ and about 5 acres of the S. E. ¼ N. E. ¼. This, it is testified, is the equivalent of the Talbot bed, which in section 14 contains 2½ feet of clean coal, and to the southeast of that in section 24 coal of the thickness of 4 feet, 10 inches. There is testimony to the effect that in what is known as the Mancos shale which

underlies the red sandstone bed, above referred to, there are a few thin seams of coal from 6 to 10 inches thick, but that this coal is non-workable in the vicinity of Gallup.

It is testified by one Kealar, who operates a drilling outfit, that in the early part of March, 1912 he sank a drill hole at a point said to be a little north and west of the center of the S. E. ¼ N. E. ¼; that after passing through several small seams of coal near the surface he encountered 10 or 12 inches of coal, as near as he could tell, at a depth of 176 feet; that underneath this was 4¼ feet of clay; that in the last run the drill made in passing through the clay there was a little coal in the washings from the hole; that the rope was then marked at the platform and the tools replaced in the well, when a run of 2 feet was made, and that the material washed from this 2 feet was nothing but coal; that another run of 1 foot was made, the washings from which showed about equal percentages of coal and clay, indicating that the drill had passed through the coal stratum. The witness testified that he is not a coal expert and that his previous experience in drilling for coal was very limited. The claimant himself testified that he was at the drill hole when Kealar took out the material; that he does not claim to be an expert, but should judge the material was coal. Referring to Kealar's testimony as to the result of said drilling, witness Gillette testifies that without doubt there are coal veins that show in the draw south of Gallup, which he measured, about eighteen months ago, in connection with other investigations, and that one of these showed about 10 inches of clean coal, and some 10 or 14 inches of black shale or coal shale. Another shows 6 or 8 inches of clean coal, with very little coal shale in connection with it, and that these beds would be about the proper horizon at the point where the drill hole was sunk for the beds disclosed therein to lie. He testified further that punch drilling of coal veins is not accurate; that a coal seam will ravel with a punch drill, and that one cannot tell with any degree of accuracy, if a seam is 2 feet or 12 inches or

less in thickness at a depth under the surface of 175 feet; that the only accurate way to drill for coal to expose its true thickness is with a double barreled diamond drill; that the drill hole referred to did not indicate that there was workable coal in the southeast forty for the reason that a punched drill is liable to give indications of a greater thickness of coal than is actually present. The Department is of opinion that the evidence as to the result of this drilling does not tend to show that beds disclosed thereby are workable or that the land was known on June 21, 1898, to possess any value on account thereof.

Coal miners and coal operators living in the vicinity of the land at or prior to the date of the grant, give it as their opinion that the land was known as of that date to be coal in character, but aside from the openings and exposures hereinabove referred to they base their opinion on the fact that it was underlain by the red sandstone, and hence, within the horizon of the lower coal group of the Mesa Verde formation, and therefore should be underlain by the Otero and Talbot beds. Several of them, however, concede that it would be necessary to drill or otherwise explore the land for the purpose of determining whether such beds, if found on the land, contained coal of workable thickness and quality. The witnesses for the protestants, however, express the opinion that the coal disclosed on the land is too thin to be commercially operated.

The regulations for the classification and valuation of public coal lands, approved by the Department February 20, 1913, provide that land shall be classified as coal land if it contains coal having—

> "A thickness of or equivalent to 14 inches for coals having a heat value of 12,000 B. t. u. or more, increasing 1 inch for a decrease from 12,000 to 11,000 B. t. u., 1 inch for decrease from 11,000 to 10,500 B. t. u., 1 inch for each decrease of 250 B. t. u. from 10,500 to 10,000, and 1 inch for each decrease of 100 B. t. u. below 10,000."

With reference to what are known as split beds of coal—that is to say beds containing two or more benches of coal separated by bands or partings—the United States Geological Survey, the recommendations of which are accepted by the Land Department in the classification and valuation of coal land, says:

> "The general practice of the United States Geological Survey in classifying coals has been to give a split bed the value of an unbroken bed with which it can fairly be compared. It is evident that a solid 3-foot bed is worth more than two 18-inch benches separated by 6 inches of clay or shale. After careful study the Survey adopted the simple expedient of prescribing that any parting or bench of bone or impure coal included in a bed injured the value of the coal of the bed in amount equal to the thickness of the parting. Thus the split bed just cited, with its 6-inch parting, is regarded as equivalent to a solid bed 30 inches thick (36 inches of coal minus 6 inches of parting equals 30 inches). If the benches on either side of the parting are not of the same thickness the thickness of the parting is deducted from the thickness of the thinner bench. It is not necessary to consider the whole thickness of a coal bed. It is the practice of the Survey to start with the best bench, if in itself not of workable thickness, and to add the thickness of the next bench above or below after deducting the thickness of the intermediate parting. If the whole bed thus included is still not of workable thickness and more benches exist above or below, the thickness of these benches is added, after subtracting the thickness of the parting between them and the principal bench. If a parting is thicker than the thinner adjoining coal bench, that bench is considered as having no value."

Applying the rule thus stated to the three beds that outcrop in the E. ½ S. E. ¼, it is obvious that none of them contains coal of a thickness of or equivalent to the minimum thickness of fourteen inches prescribed by the Coal Classification Regulations. Bed No. 2, according to the measure-

ments of Gillett contains a total of 19 inches of coal, consisting of two benches, one 8 and the other 11 inches thick, separated by an eight-inch band of shale, which would reduce the total thickness of coal to an equivalent of about 11 inches. Comment on what is designated as the No. 3 bed is unnecessary, as it is not claimed by applicant or any of his witnesses that this bed possesses any value for coal mining purposes. The bed designated as No. 4 bed contains, according to the measurements of Gillett, and their correctness is not disputed, two benches of clean coal, one 5 and the other 8 inches in thickness, separated by a band of shale one foot in thickness. This according to the rule adopted by the Geological Survey would be the equivalent of about eight inches of coal. The presence, therefore, of none of these beds upon the land would warrant its classification, or for the same reason its adjudication by the Department, as coal land. The Department is also of opinion that the testimony of the claimant's witnesses to the effect that the land should be underlain by other beds of workable thickness is too general and indefinite to support a finding that the E. ½ N. E. ¼ was known at the date of the grant to the Territory of New Mexico, to be valuable for coal.

As to the S. W. ¼ N. E. ¼, the evidence, in the opinion of the Department, fully warrants the conclusion of the local officers and the Commissioner that the land is coal in character and was known to be such at the date of the grant.

The decision of the Commissioner, therefore, in so far as it finds the S. W. ¼ N. E. ¼ to have been known to be coal in character at the date of the grant, and the S. E. ¼ N. E. ¼ to have been non-coal as of that date, is affirmed. The finding, however, that the N. E. ¼ N. E. ¼ was known to be coal in character at the date of the grant is reversed. The application will accordingly be rejected as to the E. ½ N. E. ¼; as to the S. W. ¼ N. E. ¼, it will remain intact.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary.

EXHIBIT C.

Before the Honorable Secretary of the Interior.

D-26231.

JOSEPH TILLIAN et al.
vs.
GEORGE A. KEEPERS, STATE OF NEW MEXICO, Intervenor.

"N."

Santa Fe, 015309.

Involving E. ½ of N. E. ¼ and S. W. ¼ of N. E. ¼ of Section 16, T. 15 N., R. 18 W., N. M. P. M., New Mexico.

Motion of Intervenor for Rehearing of Departmental Decision.

Comes now the State of New Mexico, Intervenor herein, by Harvey M. Friend, its attorney, and respectfully moves and prays the Honorable Secretary of the Interior to grant a rehearing of departmental decision of October 4, 1915, in the above-entitled case, in so far as the same holds and decides that the S. W. ¼ of the N. E. ¼ of Section 16, T. 15 N., R. 18 W., was *known* to be coal land on June 21, 1898, when the school-land grant embracing this and other lands, was made by Congress to the then Territory of New Mexico, to which grant Intervenor has succeeded; and, as ground for this motion, Intervenor, by its said attorney, avers and shows that, in so holding and deciding, said decision was in error, to Intervenor's prejudice, in that, under all the evidence on the record pertaining to this tract, and under the law, the judgment should have been that said 40 acre tract was not,

on June 21, 1898, and never had been *known* to be coal land, and, therefore, the same passed to said Territory under said school-land grant, and is now vested in Intervenor, as the successor of said grantee.

Said decision expressly finds that at the date said school-land grant was made, to wit, June 21, 1898, there had never been any coal mine opened on said 40 acre tract; that no coal development of any kind or character had ever, up to that time been attempted thereon; and that at most, all that could be claimed therefor, at that time, were some coal indications or outcrops which have *since* been determined to impress said 40 acre tract with a coal character, it *now* being found that said coal indications or outcrop or disclosures show the existence of a coal vein, to wit, the Black Diamond bed, underlying said 40 acres.

On that finding alone the conclusion of the decision complained of is, that this forty acre tract was *known* to be coal at the date of said grant, because—

> "these disclosures antedate the grant to the State and establish the existence of the bed within the limits of the S. W. ¼ N. E. ¼ prior thereto;

and that the same—

> "fully warrants the conclusion * * * that the land is coal in character and was *known* to be such at the date of the grant."

The error in such conclusion, in the view of Intervenor, is, that, accepting said finding of facts as correct, nevertheless, under the law, as then and for many years thereafter construed, said "disclosures" did not warrant the judgment that, at the date of said grant, the land was "known" to be coal land. On the contrary, said judgment should have been that, at the date of said grant, the 40 acres in question were not *known* coal lands, and hence that the grant being one *in præsenti*, title to said 40 acres passed to and became vested

in the Territory, and is now in Intervenor, as successor to said grantee.

Wherefore, Intervenor, by its said attorney, respectfully prays that the Honorable Secretary of the Interior will review and revoke said departmental decision of October 4, 1915, on the question just pointed out; and that he will render a new decision, in respect of said forty acre tract holding the same to have not been *known* coal land at the date of said grant, and, therefore that legal title thereto passed to and became vested in the then Territory of New Mexico, and that said legal title is now in the State of New Mexico.

Respectfully submitted,

STATE OF NEW MEXICO,
Intervenor,

By HARVEY M. FRIEND,
Its Attorney.

Brief and Argument in Support of Foregoing Motion.

The only question to be considered on this motion is one of law. The contention of the Intervenor is, that, accepting the finding of facts made in the decision under review as correct, nevertheless, the facts so found in respect of the 40 acre tract in question (the S. W. ¼ N. E. ¼) did not render said tract "known coal land" at the date when the school-land grant took effect, to wit, June 21, 1898.

The decision complained of (p. 4) correctly states the law of the case in the following language:

> "The legal title to said tracts vested absolutely in the Territory, now State of New Mexico, upon the approval of the act, unless they were *known at that date to be valuable on account of coal;*"

citing numerous authorities.

> "If, however, on the other hand, said tracts were *at that date* known to be valuable for mineral, title thereto did not pass under the grant, but remained in the general government and subject to its disposal under appropriate laws;"

citing authorities.

The facts found in said decision applicable to this particular tract are thus stated:

> (p. 5.) "The land in controversy was not returned as coal land by the surveyor and it does not appear that, *at the date of the grant*, any valid claim was being asserted thereto under the coal land laws."
>
> (pp. 6-7.) "The land lies in the northerly flank of a valley carved out by the Rio Puerco (which flows in a southwesterly direction across the southeast corner of the S. E. ¼ N. E. ¼) and within the horizon of the lower coal subgroup of the lower Mesa Verde formation, whose base consists of a massive gray sandstone about 20 feet in thickness, and which in turn is underlain by a bed of what is known as red sandstone that is exposed at places a short distance to the east of the land and in the southeast corner of the S. E. ¼ N. E. ¼. Within said lower formation of the Mesa Verde are five coal beds designated locally (reading from top to bottom) as the Crown Point, Thatcher, Black Diamond, Otero and Talbot, the latter being about 30 or 35 feet above the red sandstone. The two beds first named have been eroded from the area, if they ever existed thereon, and the Otero and Talbot, which are exposed and have been operated in Sections 14 and 24, a mile and a half or more to the east of the land, are shown too thin in the direction of the land.
>
> "The Black Diamond bed which is approximately 5 feet thick, outcrops or is otherwise exposed in the extreme northwest corner of the N. E. ¼ N. E. ¼ which it underlies to the extent of something less than an acre, and also in the southeast portion of the S. W. ¼ N. E. ¼. The easterly line of the crop between these points is concealed by a mass of wash and detritus to a depth of from 90 to 150 feet, but is shown to extend

in a northerly and southerly direction through the eastern portion of the S. W. ¼ N. E. ¼. These disclosures antedate the grant to the State and establish the existence of the bed within the limits of the S. W. ¼ N. E. ¼ prior thereto."

It is thus observed that all that is claimed in the decision as regards the existence of known coal on this 40 acre tract, at the date of the grant, is that it is *now*—not *then*—*known* that the Black Diamond bed underlies a portion of it; and that no development had been made of that bed to show whether it contained coal, or if so, how much, or whether it was in merchantable quantity or commercially valuable.

The "disclosures" relied upon as establishing the coal character of the tract, at the date of the grant, had not been developed, and it is not even found as a fact that anyone knew what said disclosures when developed would establish. At that time, then, how can it be said that it was *then known* to be coal land.

The grant to the State vested, if at all, at its date, that is, June 21, 1898. How can it be said, under this finding, that anyone *knew, at that time,* that this tract was coal land? The land department itself would not, at that time, have declared that such a showing made the tract *known* coal land; for, under the decisions of the Department, from the very beginning of the administration of the coal land law up until long after the date of this grant, it was uniformly and universally held that such a showing did not render land *known* coal land.

As held in this decision (which, in this regard, has always been the law), the title of the territory vested *at the date of the grant* unless at that date the land was *known* to be coal land. That is to say, to except the tract from the grant, its coal character must have been *known* at the date thereof. In other words, and to repeat somewhat, the *known* coal character must be determined as of the date of the grant. How was this to be determined excepting on the

facts *then known* to exist, and upon the law as it was *then* understood to be?

The State of New Mexico insists, and is entitled to insist, that the *known* or *unknown* coal character of the tract embraced in its grant must be determined on the facts, and according to the law, existing at the date the grant became effective. It insists, and, under all the authorities, it is entitled to insist, that if, at the date of the grant, the physical facts shown at that time to exist in respect of the land embraced in its grant, the law, as then declared, did not warrant a judgment that the land was *known* to be coal, it cannot now, upon a different and changed construction of the coal land law, be found that it was *then* known to be coal land. The grant vested at its date, or it did not vest at all; and so, the State of New Mexico insists, and it is entitled to insist, that the question as to whether the grant did or did not vest must be determined as of the date of the grant. These propositions are so elementary that it is difficult to elucidate them by argument. Their mere statement is, or ought to be, sufficient argument in their support.

What, then, would the Department, on June 21, in the year of our Lord 1898, have held as to the *known* or *unknown* coal character of this tract, upon the facts now found to have existed at that date, had it then been called upon to render a decision? *That* is the question now to be decided.

It will not do to say that the Department *now* holds that, upon such facts, lands so affected are *known* coal lands. The question is, What would the Department, at that date, have decided on such a state of facts? If *known* coal lands were excepted from the grant of June 21, 1898, as they were, and if the grant vested at that date, as it did, then the extent of the exception, or whether there was any exception at all, must be determined *now* as it would have been determined *then*. The grant did not, and could not stand or remain in abeyance to await the determination, at some

future time, as to whether the physical conditions shown to exist, at the date thereof, rendered the land *known* coal land; the grant attached and title thereunder became vested at its date to all the school lands embraced therein unless, at that date, they were *known* to be coal land. A grant of public lands speaks as of its date; and the extent of the grant, or what has been granted, must likewise be determined as of the same date, according to the law, as at that date, determined. And so, what is excepted from the grant, if there be any exception, must be determined upon the law as at that time construed.

The reason for this construction, or for these propositions, is found in the fact that Congress, in making the grant, is understood to speak as of that date, and to have taken into consideration the conditions then obtaining, and the law as then construed by the courts and the department having to do with the execution or carrying out of the grant.

Furthermore, "a legislative grant is a contract executed." *Fletcher v. Peck*, 6 Cranch, 87; and hence, the contracting parties thereto (here the United States and the then Territory of New Mexico) must be understood to have entered into the contract, and the contract became an executed one, in the light of what the understanding of its terms then was. If anything can be considered as settled in the law, it is that, at that date, what was understood as "known coal lands" had acquired a definite meaning; and as will be hereafter demonstrated, a showing as to coal character of lands such as is made in this case, at that date, was not considered, and had never before been considered, as sufficient to classify them as "known coal lands."

The true rule is that statutes are to be construed as they were intended to be understood when they were passed.

> "A statute is to be interpreted in accordance with the meaning of its words *at the time of its passage.*"
> 23 Am. & Eng. Enc. Law. (1st Ed.), Title "Statutes" (p. 327).

"In matters of description a statute must necessarily refer to things *as they exist at the time of its passage.*"

Griswold vs. Atlantic Dock Co., 21 Barb. (N. Y.), 228.

"If a statute makes use of a word, the meaning of which is well known and has a definite sense at the common law, the word shall be expounded and restricted to that sense."

Buckner vs. Real Estate Bank, 4 Ark., 441.

"It is a sound rule that whenever our legislature use a term without defining it, which is well known in the English law, and there has a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law."

Hillhouse vs. Chester, 3 Day (Conn.), 211.

See also—

United States vs. Smith, 4 Day (Conn.), 121; *Corning vs. Board of Commissioners,* 102 Fed. Rep., 57.

An application of this rule was made by the Supreme Court of the United States in the early case of *Curtis vs. Martin,* 3 How., 106, 110, in the construction of the tariff act of 1832. In that case the collector of the port of New York, in 1841, had levied certain duties upon an importation of "gunny cloth," claiming that it was dutiable as "cotton bagging." The importer protested, and afterwards brought suit to recover the duties paid, claiming and proving that in 1832, when the tariff act was passed, "gunny cloth" was not used as "cotton bagging," and that it was not so used until 1834. His legal proposition contended for was that the act of 1832 spoke as of its date, and that, therefore, "gunny cloth" not being used at that date as "cotton bagging," although it was so used in 1841, when the duties

were levied, said duties had been improperly levied and should be recovered. His contention was sustained by the courts, and Chief Justice Taney, delivering the judgment of the Supreme Court, said:

> "It follows that the duty upon cotton bagging must be considered as imposed upon those articles *only* which were known and understood as such in commerce *in the year* 1832, *when the law was passed imposing the duty.*"

In Endlich on the Interpretation of Statutes, section 85, it is said:

> "The rule which requires the construction of statutes with reference to their objects and subject-matters, obviously requires the language of a statute, as of every other writing, to be construed in the sense which it bore at the period when it was passed. * * * Undoubtedly, all laws must be executed according to the sense and meaning imported at the time of their passage."

In *Platt vs. Union Pacific R. R. Co.*, 99 U. S., 48, 60, which was a case involving the construction of the act of Congress of July 1, 1862, making a grant of lands to the Union Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, Mr. Justice Strong, speaking for the court, said:

> "All will concede that in construing the act of 1862, we are to look at the state of things *then existing*, and in the light *then appearing* seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions."

And again (63-64), answering the argument against placing a construction upon the act which, in the light of

experience in dealing with that legislative grant, would appear to be more in consonance with the state of things existing at the date of the decision, though very different from what were the conditions at the date of the grant, he said:

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. We may *now* think it quite possible the lands could all have been sold before July 1, 1877. The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of the railroad have shed new light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

> "Statutes are to be construed as they were intended to be understood when they were passed. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation."
>
> *County of Schuyler v. Thomas*, 98 U. S., 169, 172.

> "No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events."
>
> *United States v. Union Pacific R. R. Co.*, 91 U. S., 72, 81.

Now, on June 21, 1898, when the school-land grant to the Territory of New Mexico took effect, the term "known coal lands" had acquired a definite and well understood meaning, and that meaning was always determined, not alone by geological conditions or by surface indications, (though such

disclosures were taken into account,) but in all cases, up to the date of the Circular of Instructions of October 26, 1905, 34 L. D., 194, it had been held that "known coal land" was only such from which coal in a merchantable quantity and commercially valuable had been extracted. That is, no lands were *known* to be coal unless a coal mine had been opened thereon and valuable coal taken therefrom.

One of the early expressions of the Department on this question is found in the case of *Kings County v. Alexander*, 5 L. D., 126, 127, where Mr. Secretary Lamar, speaking particularly as regard coal lands, said:

> "It has been repeatedly held by this Department that the proof of the mineral character of land must be specific and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the land in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it. Hooper *v.* Ferguson (2 L. D., 712); Dughi *v.* Harkins (*ibid.*, 721); Roberts *v.* Jepson (4 L. D., 60); Cleghorn *v.* Bird (*ibid.*, 478); Lientz *et al. v.* Victor *et al.* (17 Cal., 272); Alford *v.* Barnum *et al.* (45 Cal., 482)."

See also—

Rice v. State of California, 24 L. D., 14, 15, and cases cited.

Jones v. Driver, 15 L. D., 514, 518.

Hamilton v. Anderson, 19 L. D., 168, 169.

McWilliams v. Green River Coal Assn., 23 L. D., 127, 130.

And as late as March 11, 1905, in the case of *Robert Dwyer v. Ernest H. Schwiethale*, which was a protest against a homestead entry, alleging that the land was coal land, and which involved certain lands in the Durango, Colorado, dis-

trict, Secretary Hitchcock, in an unreported decision, affirming the decision of the General Land Office of January 30, 1904, upon a similar state of facts, said:

> "It is not enough, to characterize land as chiefly valuable for its deposits of coal, to show that there is a vein of coal thereon; but it must affirmatively appear from the evidence that the coal exists in such quantity and quality as to make the land more valuable on that account than for other purposes."

In the case of *Jones v. Driver, supra*, decided December 2, 1892, the coal indications or disclosures on the land there in controversy were much more numerous and much better defined than in the case at bar, various witnesses having testified to the existence of coal croppings and to exposed veins of coal of from 4 to 6 feet in thickness; and yet the Department held that such land could not be considered as coal land, because there had not been any *production* of coal thereon, saying (p. 518):

> "It has been repeatedly held by the Department that it must appear that the land in dispute is valuable for its mineral and that the proof must be specific and based upon actual production." Citing authorities.

The Supreme Court had adopted a similar view. Thus, in *Deffeback v. Hawke,* 115 U. S., 392, 404-405, the question of "known" mineral lands was very fully discussed by Mr. Justice Field, speaking for the court, in the following language:

> "We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable."
>
> * * * * * * *

"We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

See also *David's Administrator v. Weibbold*, 139 U. S., 507, 522-525.

The reason for the rule adopted by the Interior Department and the courts in the foregoing regard is found in the statement of Mr. Justice Brewer, speaking for the court, in *Colorado Coal Co. v. The United States*, 123 U. S., 307, 328, as follows:

"The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preemption act cannot be successfully assailed."

As to what is meant by the term "known mines" or as to the general expression "lands *known* to contain minerals" and as to what is sufficient knowledge of such facts, attention is invited to the following authorities:

Iron Silver Mining Co. v. Reynolds, 124 U. S., 374, 383, 384.

Iron Silver Co. v. Mike & Starr Co., 143 U. S., 395, 403.

United States v. Iron Silver Mining Co., 128 U. S., 673, 683.

United States v. Reed, 28 Fed., 482, 487.

United States v. Blackburn, 48 Pac., 904, 905.

Davis's Admr. v. Weibbold, 139 U. S., 507, 524, 525.

Snyder on Mines, Sec. 667.

Reid v. Lavellee, 26 L. D., 100, 103.

These authorities were fully considered and analyzed in my brief filed in the General Land Office when the case was pending there (pp. 6 to 13, inclusive), and attention is invited to that brief, with request that the same be considered in this connection on the point here referred to. It is sufficient, perhaps, now to say that what may be considered as "known coal mines," or "known coal lands," is fully defined in *Iron Silver Co. v. Mike & Starr Co.*, 143 U. S., 395, 403, in the following language:

> "The applicant must be adjudged to have known that which others knew, and which he would have ascertained if he had discharged fairly his duty to the Government."

In other words, if there were on the lands, such coal development or such proof of "workable deposits of coal," of a "merchantable character," and "commercially valuable" as would have been accepted by the Government, *at the date of the school-land grant to New Mexico*, as meeting the requirements *then* demanded for known coal lands, the land did not pass to the Territory, but remained in the United

States for mineral disposition. But if, on the other hand, the disclosures *then* known to exist on the land would not have been sufficient to warrant the classification of it as coal land, it was not "known" coal land, and it did pass to the Territory under said grant. The test is, did the known condition, *at that date,* bring the land in the category of what was *then* denominated and acted upon as "known coal land"? Tested by this rule, which is the only true test, there cannot be any possibility of doubt on the question. No one, neither the Government nor a coal applicant, would, *at the date of said grant,* have treated this particular 40 acre tract as "known coal land," under the rules and decisions *then* obtaining; and this being true, as it is beyond controversy, it is respectfully submitted that there is no legal power or authority in the Department to decide *now* that the conditions then existing made the land "known coal land" if, *at that time,* such conditions were not regarded (as they were not) as sufficient to render the land "known coal land," under the rules and decisions then in force. IT IS THE LAW AT THAT TIME THAT GOVERNS. Whether the land passed to the Territory under the grant must be determined by WHAT THE LAW WAS CONSIDERED TO BE AT THAT DATE. This principle of law is elementary, and was discussed in former briefs, but, so far, no specific reference to said principle has been made in any decision. It is the vital and controlling principle in this case; and the authorities in support of it will now be referred to, the same being, to a degree, a repetition of what was contained in my former brief.

It is a fundamental principle of law that rights once vested cannot be divested by a change in the interpretation of the law under which they vested. Likewise, it is fundamental in the jurisprudence of the Land Department that rights acquired under an existing construction of the law will not be impaired by a later and different interpretation of the same law. The authorities in support of these propositions are uniform. A few only will be referred to.

In *Gelpcke vs. City of Dubuque,* 1 Wall., 175, 206, the Supreme Court quoted with approval the following from the opinion of Chief Justice Taney in the case of *Ohio Life and Trust Company vs. Debolt,* 16 How., 416, 432:

> "The sound and true rule is, that if the contract, when made, was valid by the law of the State as then expounded by all departments of the Government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law";

And continued:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights under a statute may be lost by its repeal. The rule embraces this case."

In *Douglass vs. County of Pike,* 101 U. S., 677, Chief Justice Waite, after reviewing a number of previous cases on this subject, said:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.
>
> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was ju-

dicially construed to be when the bonds in question were put on the market as commercial paper."

See also—

Rowan vs. Runnels, 5 How., 134.
Olcott vs. Supervisors, 16 Wall., 678, 690.
Taylor vs. Ypsilanti, 105 U. S., 60, 72.
Anderson vs. Santa Anna, 116 U. S., 356, 362, and cases cited.
Gulf & Ship Island R. R. Co. vs. Hewes, 183 U. S., 66, 71.

The same principle applies and has been fully recognized in the administration of the Land Department—that is to say, the rule of the Department has been that rights acquired under an existing construction of the law will not be impaired by a later and different interpretation; or, to express the same proposition somewhat differently, a changed construction of the law will not impair rights acquired under a former interpretation of the same law.

In *Cudney vs. Flannery*, 1 L. D., 165, 166, Secretary Teller said:

> "The regulations and rules of your office and of this Department in force at the date of Flannery's entry, had the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. He thereby acquired rights which cannot now, legally or equitably, be repudiated—especially after his compliance with the law for more than three years—even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect."

In *Miner vs. Mariott*, 2 L. D., 709, 711, Secretary Teller, discussing a construction of the law as to notice theretofore

prevailing, and holding that said former construction was erroneous, nevertheless specifically declared:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal. This view will govern you in the consideration of any similar cases which may arise."

In *Allen vs. Cooley,* 5 L. D., 261, it was held (syllabus):

> "An entry should not be canceled where it was allowed in accordance with departmental rulings then in force, and the entryman relying thereon has proceeded in compliance with the law."

To the same effect, see *James Spencer,* 6 L. D., 217, 218; *Kelley vs. Halvorson, ib.,* 225, 227.

As showing that the same rule of law on this question obtained in the Interior Department under Secretaries Lamar and Vilas, the following, from the decision of the latter in the case of *William Thompson,* 8 L. D., 104, 109, is instructive:

> "On September 15, 1887, Acting Secretary Muldrow (6 L. D., 145) advised your office relative to the proper construction of the third section of the desert-land circular of June 27, 1887 (5 L. D., 708), concerning the price to be paid by the entryman where the initial entry was made prior to the promulgation of said circular. The Acting Secretary held that the making of an entry under the desert-land law is a contract between the entryman and the United States, the entryman agreeing to reclaim the tract entered from its desert condition, and to

pay for the same at the Government price, and the United States agreeing to give him a patent for said land upon the performance of the conditions in the contract; that this contract, like all others, is to be construed and enforced according to the sense in which the parties mutually understood it at the time it was made (1 Chitty on Contracts, 104), and that effect is to be given to it, according to the law at the time it was made (*id.*, 130).

"The Acting Secretary further held that the construction of the Department, 'which had been in existence from the date of the present circular, had, while it existed, the force and effect of *law* so far as rights acquired under it are concerned;' that it was a construction of the law by the head of the Department charged with the execution of it, and the law was administered according to this construction; that it made no difference that the construction of the law has changed; that the sound and true rule is, that if the contract, when made, was valid by the law as then interpreted and administered, its validity and obligation cannot be impaired by any subsequent decisions altering the construction of the law. Citing Rowan *et al. vs.* Runnels (5 How., 134); Ohio Life and Trust Co. *vs.* Debolt (16 *id.*, 127); Gelpcke *et al. vs.* City of Dubuque (1 Wall., 175)."

In *St. Paul, Minneapolis & Manitoba Ry. Co.*, 8 L. D., 255, 262, 263, it was sought to have a decision of the Department which had stood for thirteen years as the law in the construction of the railroad grant of March 3, 1857, under which property rights had grown up, set aside as erroneous; but Secretary Vilas denied said application, and, referring to said former decision, declared that it "became a rule of property and is entitled to all the recognition which such a consequence necessarily gives it."

The Secretary then continued as follows:

> "The effect of a change of decision in reference to a question of interpretation, when property rights have arisen, has been fully determined by the Su-

preme Court. That tribunal has recognized the right of the Supreme Court of a State to interpret the constitution of the State and the validity of laws enacted thereunder; but it held in the case of municipal bonds that where, at the time of the loan and issue of such bonds, the decisions of the State court upheld the validity of the law which authorized them, a later decision, denying the constitutionality of such law, cannot be admitted to destroy the obligation in the hands of parties who have bought them upon the faith of the earlier decision. *Thompson vs. Lee County* (3 Wall., 327); *Kenosha vs. Lamson* (9 Wall., 477); *Gelpcke vs. Dubuque* (1 Wall., 175); *Mitchell vs. Burlington* (4 Wall., 270). The doctrine of these cases is applicable to the question now under consideration, and must be taken in connection with the other principle referred to as rendering it obligatory upon the Department to respect the later adjudication of the Department affecting the right now involved, to the same extent as if it were the only opinion ever promulgated by the Department, because all the consequences in destruction of property rights upon the faith of a decision attach only to the latter."

The same rule of law prevailed under the administration of Secretary Noble. Thus, in the Instructions of July 16, 1889, the Secretary himself, in approving an opinion of the First Assistant Secretary, 9 L. D., 86, referring to timber-culture entries made under a ruling of the Department not then in force, said:

> "But if the entry was made under rulings of the Department in force when the application was made that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal."

Again, in *Mary R. Leonard*, 9 L. D., 189, 190, 191, Mr. Noble, after referring with approval to previous decisions

of the Department and of the courts to the same effect, continued:

> "The law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction, would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal,' and as objectionable as the enactment by legislative bodies of retrospective laws, which 'are generally unjust and to a certain extent forbidden by that article of the Constitution of the United States which prohibits *ex post facto* laws or laws impairing contracts.' (Bouvier's Dic., Title 'Retrospective.') All that can be required of the citizen by any just government, is, that he conform to the law as at the time expounded by its courts or other tribunals invested by it with such authority."
>
> See also *John M. Lindback*, 9 L. D., 284, 286.

The administration of Secretary Hoke Smith also followed this rule of law. Thus, in the case of *Smith Hatfield*, 17 L. D., 79, 80, 81, the Secretary declined to consider the correctness of a long line of decisions that had obtained for thirteen years, saying:

> "While to strictly apply the doctrine of *res judicata* in *ex parte* cases, or cases between the Government and claimants under its laws, would perhaps be harsh, yet there must come a time when even this class of cases should be regarded as closed and finally settled. But if *res judicata* be not applied to this case, the legal principle involved seems so well settled by numerous decisions of the Department that I am not now called upon to determine its correctness.
>
> "January 3, 1880, more than thirteen years ago,

Secretary Schurz in the Wilson Miller case (6 C. L. O., 190), held that the Missouri Home Guards are not entitled to the benefits of section 2306 of the Revised Statutes. This interpretation of the law was adhered to August 30, 1883, by Acting Secretary Joslyn, in the case of William French (2 L. D., 235), and by Secretary Teller on October 1, 1883, in the same case, on review (*ib.*, 238). It was also endorsed and adopted by Secretary Vilas on March 1, 1888, in the original decision in the case now before me (see 6 L. D., 557), and again by the same Secretary, in the same case on review, August 18, 1888 (press copy book 161, p. 415).

"The question was also directly passed upon, August 18, 1888, by Secretary Vilas, in the case of Chauncey Carpenter (7 L. D., 236), and the same conclusion reached, viz: that the right to make soldiers' additional homestead does not extend to members of the Missouri Home Guard.

"Thus, for a number of years, the rulings of the Department have uniformly been to the effect indicated, and the principle has become so well established as to bring it within the rule of *stare decisis*, and as so settling a point by decision that it forms a precedent not to be departed from. * * *

"I must therefore decline to disturb a ruling of so long standing as that which controls in this case."

See also—

Knight vs. Hoppin, 18 L. D., 324, 325-6.

Bender vs. Schimer, 19 L. D., 363, 365.

In *Pennoyer vs. McConnaughy*, 140 U. S., 1, 23, the Supreme Court, speaking by Mr. Justice Lamar, used this forcible language:

"The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a con-

> struction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved or unless the construction itself is manifestly incorrect."

In *State of Missouri vs. Miller*, 50 Mo., 129, 138, the court said:

> "Where a contract, when made, is valid by the laws of the State as then expounded by the departments of the Government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the legislature or decision of its courts, altering the construction of the law."

See also—

Bacon vs. Texas, 163 U. S., 207, 221.

Turner vs. Wilkes County Commissioners, 173 U. S., 461, 464.

In *Samuel E. Crow*, 42 L. D., 313, 314, the Department, in restoring an early ruling of 1875, regarding soldiers' additional homestead rights which had been set aside by a former administration, used this language:

> "While I believe that ruling was correct, nevertheless, if I entertained doubt regarding the matter, in view of the long, unbroken line of action respecting rights, which the Supreme Court has held assignable, I should feel bound thereby, for rights so acquired should properly be reckoned as of the nature of property rights and should not be disturbed by a change in departmental ruling, except upon the authority of some higher and controlling opinion, such as that of the Supreme Court."

The same principle was hinted at, though not fully expressed, it not being necessary to do so therein, in the cases of *William B. Rosser*, 42 L. D., 571; *Brown Bear Coal Association, ib.*, 320, and *Roy McDonald*, 36 L. D., 205, 208-9, and cases there cited.

In the *Rough Rider and Other Lode Mining Claims*, decided December 26, 1913, On Review, 42 L. D., 585, 587-8, the Department, referring to a change of rule regarding what should be considered as a discovery under the mining laws, and holding that such a change should not prejudice an entry made under such rule as originally made and construed, said:

> "It was upon showing such as this that entries and patents were allowed for mining claims in this region at the dates of the locations and entries of the claims here involved. There can be no question, therefore, that at those times a more liberal rule with reference to mining locations situated in this region prevailed in the Land Department than that applied by the Department with respect to the claims here in question in its decision of January 31, 1911, and that had said earlier rule been followed with regard to these locations they would in the absence of other objections have been passed to patent. This being true, and it appearing that these locations and others in that vicinity, based on the same character of discovery, had been, in reliance on such rule, purchased and dealt with as property, the Department is now of opinion that the rule under which the entries were canceled should not have been given retroactive application to the prejudice of the owners of the claims, but, on the other hand, that the said previous and long-continued practice of the Land Department established a rule of property with respect to such claims which should have been adhered to and followed in the determination of this case.
>
> Germania Iron Co. *vs.* James, 89 Fed., 811.
> James *vs.* Germania Iron Co. and Belden *vs.* Midway Company, 107 Fed., 597.
> Howe *vs.* Parker, 190 Fed., 738.
> Henry W. Fuss, 5 L. D., 167.
> William Thompson, 8 L. D., 104.
> William Drew, 8 L. D., 399.
> French Lode, 22 L. D., 675.
> Gowdy *vs.* Kismet Gold Mining Co., 24 L. D., 191.
> Brick Pomeroy Mill Site, 34 L. D., 320.
> Hidden Treasure Consolidated Quartz Mine, 35 L. D., 485."

The same principle was announced by the Department in the very recent case of *Bertram C. Noble,* decided January 29, 1914, 43 L. D., 75, overruling the former decision of the Department in *Fisher vs. Rule,* 42 L. D., 62 and 64.

Applying the principle announced in the decisions just referred to, to the facts of this case, how can any doubt arise on the question as to whether the school-land grant of June 21, 1898, should be *now* construed and acted upon as it would have been construed and acted upon *at that time?* In other words, if, at the date of the grant (it being a grant *in præsenti* taking effect as of its date), the Department would have held that the "disclosures" on the face of the land in controversy did not make the land *"known* coal land" (and it would have done so had the question been presented *at that time*), the authorities just referred to are absolutely clear to the point that the Department cannot *now* legally declare that such "disclosures" rendered the land *"known* coal land" *at that date.* It must *now* decide, upon the facts of record, as it would have decided, on the same facts, *at that time.* If that principle is not sound, under the decisions referred to, then counsel must confess that it is impossible for him to understand the purport of said decisions.

There is another well settled principle of law, which has been hinted at in the foregoing, but which will be now more fully discussed, that leads to the same conclusion. It is this:

The title of the Territory of New Mexico to its school lands *vested,* if at all, at the date of the grant. This is elementary, and the authorities in its support are so numerous as to not require citation. Let some of the authorities on the question of what is meant by *vesting* of a title be considered:

In 4 *Kent's Comm.,* 202, the learned author says:

> "An estate is vested where there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seisin."

In *Bouvier's Law Dictionary*, it is said:

> "To VEST, *estates*, is to give an immediate fixed right of present or future enjoyment; an estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest, when there is a present fixed right of future enjoyment."

In 28 *Am. & Eng. Enc. of Law* (1st Ed.), p. 442, note 3, Title "Vested," it is said:

> "'By a vested estate, in relation to interests of a freehold quality, is to be understood an interest clothed, as to legal estates, with a legal seisin, or, as to equitable estates, with an equitable seisin, which enables the person to whom the interest is limited, to exercise the right of present or future enjoyment immediately, in point of estate. A vested estate is an interest clothed with a present legal and existing right of alienation.' 1 Preston on Estates, 65, followed in Hayes *v.* Goode, 7 Leigh (Va.), 496.
>
> "'Estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect, remains uncertain.' Tayloe *v.* Gould, 10 Barb. (N. Y.), 396.
>
> "'An estate is vested when there is a person in being who will take if the precedent estate then terminates.' Sheridan v. House, 4 Keyes (N. Y.), 587."

In the light of these elementary authorities, upon what state of facts, and under what law, is it to be determined whether the Territory's title did or did not *vest* at the date of the grant? Manifestly, upon the facts *then known* to exist, and under the law as then construed and interpreted. For, if not under the law as then interpreted, *when* was the interpretation of the law to become effective? Was the question of the vesting of title to the grant to remain in abeyance and subject to varying constructions and interpretations of the granting Act? When was the question to become finally

settled? How could there be a *present* vesting of title unless it was under the law, as *then* construed and interpreted? These questions suggest their own answers. Manifestly, whether the title *vested* to any particular tract must be determined by the *known* mineral or non-mineral condition of such tract at the date of the grant, and whether the physical conditions then *known* to exist were such as that they constituted *known* mineral land or not. So, in this case, it may be conceded for present purposes that the "disclosures" on this 40-acre tract were known to exist at the date of the grant. But, in order to defeat the vesting of the grant to said 40 acres, *at that date*, that is not enough; it must also appear that said "disclosures," *at the date of the grant*, were then, under the law as *then* interpreted, such as to make the tract "known coal land," and, *at that time*, the law did not declare such land "known coal land," as has been abundantly and clearly shown in the foregoing. Hence, title under the school land grant became vested in the Territory at the date of the grant.

To hold otherwise would be to make the school-land grant a conditional one dependent upon what, perchance, might be thereafter decided by the Department. It would leave the question as to whether title under the grant *vested* or not, "in the air." How could the title *vest* at a particular date except under the law as *at that date* declared and interpreted?

For the foregoing reasons, the decision complained of should be set aside and revoked, and a new decision rendered holding the tract in question to have been not "known" coal land at the date of the school-land grant to New Mexico Territory, to wit, June 21, 1898.

Respectfully submitted,

HARVEY M. FRIEND,

Attorney for State of New Mexico, Intervenor.

EXHIBIT D.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, December 24, 1915.

D–26231.

JOSEPH E. TILLIAN and Others
v.
GEORGE A. KEEPERS, JR.

"N."
Santa Fe 015309.

Coal-land Application. Modified. Rehearing Denied.

Motion for Rehearing.

In behalf of the State of New Mexico, intervenor in the case of Joseph E. Tillian and others *v.* George A. Keepers, Junior, a motion for rehearing has been filed respecting the decision of October 4, 1915, so far as the same allows a part of Keepers' coal-land application, viz: the S. W. ¼ N. E. ¼, Sec. 16, T. 15 N., R. 18 W., on the ground that the tract was known to be coal land at the date of the school-land grant to the Territory.

After a full hearing and the taking of voluminous testimony, the local officers decided that the several tracts included in Keepers' application contained workable deposits and were known to be coal land prior to the said school grant. On appeal, this decision was affirmed by the Commissioner as to the N. E. ¼ N. E. ¼ and S. W. ¼ N. E. ¼, but reversed as to the S. E. ¼ N. E. ¼ of Sec. 16. The Department, however, has modified the last decision by re-

jecting all the application except as to the land now in question, respecting which it is held intact.

To arrive at that decision, the testimony was subjected to a careful examination and analysis, and every allegation affecting each separate subdivision involved was considered. No new facts are brought forward in support of the motion for rehearing, and it does not appear that any matters are submitted in argument which have not already received attention.

The motion is denied.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary.

EXHIBIT "E."

Santa Fe 015309. "N." J. A. W.

J. A. W. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *January* 5, 1916.

Involving Coal Application Made May 15, 1911, for E. ½ N. E. ¼ and S. W. ¼ N. E. ¼, Sec. 16, T. 15 N., R. 18 W., N. M. M.

JES SULLIVAN (alias JOSEPH TILLIAN) et al.
v.
GEORGE A. KEEPERS, JR.

Register and Receiver, Santa Fe, New Mexico.

SIRS: In reference to the above-entitled case, you are advised that the decision of the Secretary of the Interior dated October 4, 1915, has become final. A copy of said decision, together with a copy of the departmental decision of December 24, 1915, is herewith inclosed for your information and for your files. The contest is hereby finally closed.

The coal application, in accordance with the departmental decision, has this day been finally rejected so far as pertains to E. ½ N. E. ¼, Sec. 16; as to S. W. ¼ N. E. ¼, Sec. 16, action will now be promptly taken upon the final proof heretofore submitted, and if found satisfactory, recommendation will be made that the existing executive withdrawal be revoked.

Copies of this letter and of the departmental decision of December 24, 1915, are inclosed herewith for transmittal to the proper representatives of the contestant, the contestee and the State of New Mexico.

Very respectfully,

C. M. BRUCE,
Assistant Commissioner.

EXHIBIT "F."

In reply please refer to Santa Fe 015309 "N" J. A. W.
W. J. H.

3 x
1 x P. H. L.
J. A. W. 1 x B. H. G.

1 x

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, February 17, 1916.

Authorization of Final Certificate.

Register and Receiver, Santa Fe, New Mexico.

SIRS: May 12, 1911, George A. Keepers, Jr., filed coal declaratory statement 015309, including S. W. ¼ N. E. ¼, Sec. 16, Tp. 15 N., R. 18 W., N. M. M., and thereafter submitted proof and made payment for the land at the appraised price of $20 per acre. Because of pending protests final certificate has not been issued.

In the meantime there have been pending contest proceedings in regard to the filing which after successive appeals to this office and to the Department were December 24, 1915, finally adjudicated by the Department, holding the land to be coal in character and subject to inclusion in the claimant's application.

During the pendency of these proceedings, however, namely, August 25, 1915, the land was withdrawn by Executive Order and included in Coal Land Withdrawal, New Mexico No. 8, which said withdrawal is still in force.

Thus it appears that the claimant initiated his claim, submitted proof and made payment prior to the existent withdrawal, and moreover, while the land was not embraced within any withdrawal. There would not, therefore, at the

present time seem to be any objection to the issuance of final certificate, and subsequently of patent (see 39 L. D., 201).

You are accordingly, upon the payment of any sums which may be due and in the absence of objection not known to this office, authorized to issue final certificate.

Very respectfully,

CLAY TALLMANN,
Commissioner.

BOARD OF LAW REVIEW,
By W. H. LEWIS.

2-14 nap.

(30619)

10s

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE STATE OF NEW MEXICO, complainant, *v.* FRANKLIN K. LANE, SECRETARY OF THE Interior of the United States, and Clay Tallman, Commissioner of the General Land Office of the United States, defendants.	No. 20, Original.

MOTION TO DISMISS.

Now come the above-named defendants and move that the bill of complaint be dismissed, and in support of the motion respectfully show:

First. That this court has not jurisdiction to grant the relief prayed for in this bill because the United States is a necessary party. It appears from the bill that the legal title to the land involved is in the United States, and that it is the purpose of the defendants to dispose of the land in accordance with the provisions of the mineral land laws of the United States. If, therefore, the court should grant the prayer of the bill and enjoin the defendants from carrying out their purpose, the United States would be deprived of the purchase price of the land.

63019—16

Second. That it appears from the said bill that the State of New Mexico has not now, and never has had, any title, interest, or claim in or to the land constituting the subject matter of this suit, for the reason that at the date of the act of Congress of June 21, 1898, 30 Stat. 484, c. 489, under which the land is claimed by the State, the land was known to be valuable for the deposit of coal contained therein, and was therefore not intended to be, and was not in fact, granted to the Territory of New Mexico, the predecessor of the State of New Mexico, by the aforesaid act of June 21, 1898; nor was it granted by any subsequent act of Congress.

Third. That it appears from the bill that full and complete inquiry has been made by the Interior Department into the character of the land involved in this suit, and that the Secretary of the Interior and his subordinate officials, the Commissioner of the General Land Office and the register and receiver of the local land office, have all found the fact to be that at the date of the passage of the said act of June 21, 1898, the particular tract of land involved in this suit was known to be valuable for the mineral contained therein, as fully shown by the exhibits attached to the plaintiff's bill of complaint.

Fourth. That it appears from the bill that one George A. Keepers, jr., has purchased the land involved from the United States, and is therefore an indispensable party.

Fifth. That the said bill is in other respects uncertain, informal, and insufficient, and does not state facts sufficient to entitle the State of New Mexico to any relief.

Wherefore, the defendants respectfully ask that the bill be dismissed and that they be allowed their costs and charges in this behalf sustained.

THOMAS WATT GREGORY,
Attorney General.
JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1916.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE STATE OF NEW MEXICO, PLAINTIFF, *v.* FRANKLIN K. LANE, SECRETARY OF THE Interior of the United States, and Clay Tallman, Commissioner of the General Land Office of the United States.	No. 20, Original.

BRIEF FOR DEFENDANTS ON THEIR MOTION TO DISMISS THE BILL OF COMPLAINT.

STATEMENT OF THE CASE.

This is an original bill filed in this court to establish the title of the State of New Mexico to forty acres of land in a section numbered sixteen, which it claims under the laws of the United States, and to restrain the Secretary of the Interior and the Commissioner of the General Land Office from issuing a patent for the tract involved to an applicant under the mineral-land laws of the United States.

The bill alleges that by the act of June 21, 1898, 30 Stat. 484, Congress made a grant to the Territory of New Mexico as follows:

> That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any Act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided: * * *

and that upon its admission into the Union under the enabling act of June 20, 1910, 36 Stat. 557, 561, the State of New Mexico succeeded to the rights of the Territory in respect of this land grant.

The bill also alleges that the township in which this tract is situated was surveyed in 1881 and the plat filed in the local land office, upon which the lands therein became subject to disposal on July 21, 1882, and that section 16 of the township had not been sold, reserved, or otherwise disposed of, nor was it known to contain mineral at the time the school land grant was made to the Territory by the act of 1898. Par. VI, p. 5.

In this connection the bill, which is decidedly argumentative, alleges that the land grant made to

the Territory was one *in præsenti* and that the tract involved having been identified by survey long prior to the date of the grant, title in fee passed to the Territory, unless the land was then known to contain mineral; that it was not "known coal land" for the reason that under the uniform interpretation placed upon the coal-land law by the Land Department, the only "known coal lands" were those from which there had been actual production of coal of merchantable quality and commercially valuable. Par. V, p. 4; Par. VIII, pp. 6 *et seq.*

Continuing in this argumentative strain, the bill avers that the long uninterrupted construction of the Land Department "became a rule of property" on which parties purchasing school lands from the Territory had a right to rely, and of which the State can not be deprived by any subsequent change in the construction of the law; that the title in fee having vested, as it is alleged to have done under the construction which obtained at the time of the grant, it could not be divested by any changed interpretation of the same law.

Having thus reached the conclusion that the title to the 40-acre tract in question had become vested in the Territory at the time of the passage of the granting act of 1898, the bill avers that the defendants in their official capacities have held that one George A. Keepers, jr., who in the year 1911 made application to purchase the tract under the coal-land laws of the United States, is entitled to a patent therefor which they are about to issue to him.

The bill then sets forth the proceedings had in the Land Department in connection with the application of Keepers to purchase the tract involved, from which it appears that protests having been filed against the allowance of the application, a hearing was ordered, testimony submitted, and a decision rendered by the register and receiver holding that the land was known to contain coal several years prior to the date of the grant to the Territory; that on appeal to the Commissioner of the General Land Office the decision of the register and receiver was affirmed, and on further appeal to the Secretary of the Interior the latter affirmed the commissioner's holding and refused to grant a review on motion therefor.

The decisions of the Commissioner and of the Secretary, the argument in support of the State's contention before the Interior Department, together with copies of letters from the Commissioner to the local land officers, are made exhibits to the bill. Among these is Exhibit "F," which shows that Keepers had submitted proof on his mineral application and made the payment, $20 per acre, therefor. (Page 72.)

It will thus be seen that while the plaintiff alleges that the land in question was not known to be coal land at the time of the school grant to the Territory of New Mexico in 1898, nevertheless the bill proceeds to show in detail the proceedings in the Land Department wherein the Secretary of the Interior and his subordinates specifically found

that the land was known to be coal land at the time the school grant was made to the Territory of New Mexico. Moreover, the bill also affirmatively shows that the mineral applicant, George A. Keepers, has been allowed to make entry and payment for the particular tract involved in this controversy.

The defendants have filed a motion to dismiss the bill, to sustain which we consider it necessary to present only the following propositions, which will be considered in the order given.

First. This court has not jurisdiction to grant the relief prayed for in the bill, because the United States is a necessary party.

Second. The Interior Department having exclusive jurisdiction in the premises, has, after complete inquiry, found the fact to be that at the date of the school-grant act of 1898 the tract involved was known to be valuable for the mineral contained therein, and that finding is not subject to review by the courts.

Third. One George A. Keepers, jr., has purchased the land from the United States, and is therefore an indispensable party to any proceeding affecting the title.

ARGUMENT.

I.

This court has not jurisdiction to grant the relief prayed for in the bill, because the United States is a necessary party.

The defendants haye no personal interest in the subject matter of this suit. As agents of the United

States and acting under its laws they propose to convey the land to one who has paid into the Public Treasury the price prescribed by law for public coal land. The plaintiff does not contend that irrespective of its character this land became the property of the State upon the passage of the granting act of 1898. The most that it contends in this regard is that to be excepted from the grant the land must have been "known coal land" at the date of the act. Clearly this question can not be properly determined in this case, or in any proceeding to which the United States is not a party. It can not be sued without its consent, and that consent has not been given. *Louisiana* v. *Garfield*, 211 U. S. 70.

II.

The Interior Department having exclusive jurisdiction in the premises, has, after complete inquiry, found the fact to be that at the date of the school-grant act of 1898 the tract involved was known to be valuable for the mineral contained therein, and that finding is not subject to review by the courts.

Conceding the correctness of the plaintiff's contention that to defeat the State's title the land must have been known to contain mineral at the date of the grant in 1898, it still follows that the bill should be dismissed. Whether this tract was known coal land at that time is a question of fact which the courts have no authority to determine, as it has been committed to the exclusive jurisdiction of the Land Department, a special tribunal created by

Congress to execute the laws which regulate the disposition and care of the public domain, and while proceedings for acquiring title are pending before that department the courts will not interfere. *Marquez* v. *Frisbie,* 101 U. S. 473, 475; *Bockfinger* v. *Foster,* 190 U. S. 116, 126; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324.

If then the question as to the known character of this land in 1898 were now under consideration in the Land Department, it is obvious that there could be no resort to the courts to control, or in any manner influence the department in its disposition of the matter. But the bill shows that this question has already been decided by that department, every arm of which—the register and receiver, the Commissioner, and the Secretary—has found it to be a fact that the tract of land involved herein was known to contain coal when the school grant was made to New Mexico on June 21, 1898. Hence it follows *a fortiori* that the courts are without jurisdiction, because the findings of fact made by the department in a matter properly before it are binding and conclusive. *Heath* v. *Wallace,* 138 U. S. 573, 585; *Barden* v. *Northern Pacific Railroad Co.,* 154 U. S. 288, 329; *Catholic Bishop of Nesqually* v. *Gibbon,* 158 U. S. 155, 166.

It may be said in this connection that the plaintiff contends that the determination of the Land Department that the land was known to be mineral in 1898 was not a finding of fact but rather a conclusion of law, and the bill suggests that there was

insufficient evidence upon which to base the conclusion announced by the Secretary and his subordinates.

We are unable to follow this line of reasoning. If the conclusion depended upon the character and quantity of the evidence submitted, the question was necessarily one of fact. However, the known character of a tract of land at any given time is so clearly a question of fact that further discussion seems altogether unnecessary. And if there was any evidence at all upon which the Land Department based its findings, as there clearly was in this case, the courts will not inquire into its sufficiency.

Nor are we impressed with plaintiff's contention that at the date of its school grant the Land Department regarded as coal land only that from which coal of commercial value had been actually produced; and as the plaintiff and those purchasing from it had a right to rely upon that interpretation of the coal-land law, a title acquired thereunder can not be divested by any subsequent construction of the same law.

The trouble with this argument is that it assumes the truth of the main proposition which it seeks to establish, namely, that title vested in the State on the passage of the school-grant act. Whether title so vested depends upon the known character of the land at that time, and the plaintiff does not contend that the Land Department has ever found that this particular land was not valuable for coal, but insists that if the interpretation of the coal-land law

as applied in a number of cases cited had been applied to this land, it would have been classed as nonmineral.

In the first place, there has never been any fixed rule that land becomes valuable for coal only through its actual discovery. Such was the express holding of this court in the comparatively recent case of *Diamond Coal and Coke Company* v. *United States,* 233 U. S. 236. In the next place, we do not concede that the interpretation of the coal-land law as applied to certain tracts of land in the States of Colorado, Washington, or elsewhere, can of itself affect the title to another tract of land in the Territory of New Mexico under an entirely different law. The Territory of New Mexico did not assume to sell this land. Furthermore, it was not authorized by the granting act to sell school lands (sec. 10, 30 Stat. 486), and so far as appears, the Territory asserted no claim to the land until about the year 1910, when a bill was introduced in Congress to authorize the Territory to sell the tract, with other parts of the school section, to the town of Gallup (H. R. 21892). Prior to that time three separate coal declaratory statements had been filed for this land, one in 1883, another in January, 1898, and a third in April, 1899, Exhibit "A," pp. 29, 30; and in this connection it is interesting to note that during the period of the publication of notice of Keepers' application to purchase this tract a copy of the notice, which had been sent to the

"representative of the State of New Mexico," was returned with the following indorsement:

> We waive all rights in the matter as the land could not become the property of the Territory until 1898 and as it was known as coal land previous to that date we lost our rights. (Exhibit "A," p. 24.)

III.

One George A. Keepers, jr., has purchased the land from the United States and is therefore an indispensable party to any proceeding affecting the title.

The bill and its exhibits show that this tract of land has been entered at the local land office by George A. Keepers, jr., who has paid the purchase price of $800, and been awarded a final certificate of entry. He has thus acquired such an interest in the land as to render him an indispensable party to this suit, in which the State of New Mexico seeks to establish title in itself. To decide the controversy without considering his rights would violate the familiar rule in equity of doing complete justice by deciding upon and settling the rights of all parties having a material interest in the subject of the suit; and no decree can be rendered in this case without affecting Keepers' material interests.

It is no answer to this to say that if Keepers is a citizen of New Mexico, as presumably he is, to join him as a party defendant would oust this court of jurisdiction, but it rather constitutes an additional

reason for dismissing the bill. *California* v. *Southern Pacific Co.*, 157 U. S. 229.

In the case just cited the State of California brought an original bill in this court against the Southern Pacific Company to quiet title to land in the harbor of the city of Oakland. A motion of the city to intervene was denied, but the court permitted the city to file briefs accompanied by documents and maps showing its alleged title. The showing thus made satisfied this court that the city of Oakland and its grantees claimed substantial interests in the subject matter of the suit, and it refused to proceed without them, saying:

> We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal. (Page 257.)

The court therefore refused to retain jurisdiction of the case because of the interests of the city of Oakland and others, citizens of the State of California, who, it was held, could not be made parties to an original suit in this court brought by the State of California against a citizen of another State.

So, in this case, Keepers has such an interest in the subject as to entitle him to a hearing in any proceeding affecting the title; and if, as is presumed, he is a citizen of New Mexico, that but furnishes another reason for denying the jurisdiction of this court.

For the reasons given, it is respectfully submitted that the bill should be dismissed.

JOHN W. DAVIS,
Solicitor General.

S. W. WILLIAMS, *Attorney.*

NOVEMBER, 1916.

O

SUBJECT INDEX.

INDEX OF CASES CITED.

INDEX ACTS OF CONGRESS.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 20, Original.

THE STATE OF NEW MEXICO, COMPLAINANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS.

BRIEF OF COMPLAINANT IN REPLY TO MOTION OF DEFENDANTS TO DISMISS AND TO BRIEF IN SUPPORT THEREOF.

The case is presented upon the motion on behalf of the defendants to dismiss for want of jurisdiction, and their brief in support thereof. In essence, the claim is that the title to the property in question remains in the United States, and upon this hypothesis the contention is made that the United States is the real party in interest, and that the bill should be dismissed because the United States cannot be sued without its consent.

As the theory of the motion is diametrically opposed to the theory of the complaint, it is deemed proper to state the salient averments of the bill.

The bill was filed, with leave of court, under Section 2 of Article III of the Constitution of the Unitcd States, on April 3, 1916. Process was issued and due service thereof was made.

The bill avers that the complainant is one of the sovereign States of the United States; that defendant Lane is a citizen of the State of California and Secretary of the Interior Department of the United States; that the defendant Tallman is a citizen of the State of Nevada and Commissioner of the General Land Office of the United States; that Congress passed an act, approved June 21, 1898 (30 Stats., 484), entitled "An act to make certain grants of land to the Territory of New Mexico, and for other purposes," by the first section of which there was granted to said Territory every 16th and 36th sections of public land in the Territory which were not mineral and had not been sold or otherwise disposed of by or under the authority of any act of Congress, with certain reservations and conditions not necessary to be considered herein; that by sections 6, 10, and 12, of an act approved June 20, 1910 (36 Stat., 557, 561), the grant which had been made to said Territory by said act of June 21, 1898, was transferred, ratified and confirmed to the future State of New Mexico; that by proclamation of the President of the United States dated January 6, 1912, the State of New Mexico was admitted into the Union on an equal footing with the other States of the American Union, so that the present beneficiary of said school-land grant of June 21, 1898, is the present State of New Mexico; that said school-land grant of June 21, 1898, was, and has always been held to have been, a grant *in præsenti*, under which absolute title and fee to all sections 16 and 36 in the Territory which were, at that date, identified by the public surveys, passed to and became immediately vested in said

Territory at the date of the approval of said act, unless at said date the same were *known* to be mineral in character, and no certificate or patent was necessary to pass such absolute title in fee to said Territory, citing *Territory of New Mexico,* 31 L. D., 389; that township 15 north of range 18 west, New Mexico principal meridian, then within the Territory of New Mexico and now within the limits of the State of New Mexico, was surveyed by the United States Government in 1881, and the survey was approved by the Surveyor General of New Mexico also in 1881, and the township plat was filed in the local land office within the district in which said township was embraced, and the land thereupon became subject to disposal on July 21, 1882, many years prior to the date of said school-land grant of June 21, 1898; that said section 16 in said township at the date of said school-land grant had not theretofore been sold or otherwise disposed of by or under the authority of any act of Congress, and the same was not embraced in any Indian, military, or other reservation of any character, so that at the date of said school-land grant of June 21, 1898, said section 16, having been identified by said survey, title in fee thereto passed to and became immediately vested in said Territory, unless the same was, at that date, *known* to contain mineral; that the S. W. ¼ of N. E. ¼ of section 16 in said township 15 north, of range 18 west, in New Mexico, at the date of said school-land grant of June 21, 1898, was not *known* to be mineral in character and was not then *known* coal land, under the interpretation of the coal-land law which then, and had uniformly, prevailed ever since the enactment of that law in that, at said date, there had never been any attempt on the part of anyone to discover and develop any coal upon said tract, and no coal had been produced or extracted therefrom, and there was no production of coal from said tract until in 1911, about 13 years after the absolute title in fee to said tract had vested in said Territory; that the uniform interpretation of the coal-land law up

until October 26, 1905, was that, in order to establish the fact of "*known* coal lands," there must have been a prior actual production of coal from such lands, of a merchantable quality and commercially valuable, and that even to show that there was a vein of coal thereon was not enough to characterize the land as coal land, citing many authorities; that said long, uninterrupted, and uniform construction of grants of the character of said school-land grant of June 21, 1898, continued as it was for many years after said grant became absolutely vested in fee in said Territory, *became a rule of property*, and title in fee to said school lands so granted by said act of June 21, 1898, having once vested, as it did, under the law as construed and interpreted at said date, could not thereafter be divested by a change in the construction and interpretation of said law; that such uniform construction of such grants for so many years, existing at the date of said school-land grant of June 21, 1898, being known to Congress when it enacted said statute, was adopted by Congress, and became the rule of construction for the future in the administration of said school-land grant; that the acceptance of said school-land grant by the Territory of New Mexico became an executed contract between it and the United States, to be construed and interpreted according to its terms as interpreted and understood at the date of said grant; that as no coal mine had ever been opened on said S. W. ¼ of N. E. ¼ of said section 16, or coal extracted from said tract, at the date of said school-land grant of June 21, 1898, or for many years thereafter, the absolute title in fee thereto passed to and became vested in the Territory of New Mexico and is now the property of the State of New Mexico, the successor in title and interest of said Territory; that notwithstanding the fact that title to said 40-acre tract had become vested in fee in said Territory at the date of said school-land grant of June 21, 1898, and could not be divested by anything occurring thereafter, nevertheless, the Commissioner of the General Land Office

and the Secretary of the Interior have held and decided that a coal-land locator of said S. W. ¼ of the N. E. ¼ of said section 16, whose claim was initiated and filed in 1911, is entitled to have a patent for said tract, and those officials are about to issue a patent for said tract to said coal-land applicant; that by certain proceedings in the General Land Office and in the local land office at Santa Fe, New Mexico, within which district the lands in question are situated, all of which are specifically set forth in the bill of complaint, and after a hearing before the local land officers, said local land officers decided that, regardless of the lack of development prior to June 21, 1898, subsequent developments have established clearly that the S. W. ¼ of N. E. ¼ of said section 16 contains a vein of coal several feet in width, and workable; that, upon appeal, the Commissioner of the General Land Office by decision of December 18, 1913, upon the same evidence before the local officers, which did not show that there had ever been any coal production from said section 16, at or prior to the date of said school-land grant of June 21, 1898, and not until 1911, and notwithstanding the fact that, by previous letters of his office, specifically mentioned, he had declared that the lands in question were not *known* to be coal in character, but had been found by a special agent of his office to be non-coal in character, even long after the date of said school-land grant of June 21, 1898, nevertheless affirmed the decision of the local officers as respects said S. W. ¼ of N. E. ¼ of said section 16, holding, as a conclusion of law, that, notwithstanding there had been no coal production from said S. W. ¼ of N. E. ¼ of said section 16, still, from geological conditions only, said tract was known coal land at the date of said school-land grant of June 21, 1898, the findings of the Commissioner of the General Land Office and his conclusion of law thereon being set out in full in the bill of complaint; that on appeal from said decision of the Commissioner of the General Land Office, the Secretary of the Interior, by

decision of October 4, 1915, correctly decided that said school-land grant of June 21, 1898, was a grant *in præsenti*, and that title to the lands so granted vested absolutely in the Territory, now State, of New Mexico, upon the approval of said act unless they were *known* at that date to be valuable on account of coal, but then went on and found that no coal mine had ever been opened or coal extracted or produced in a merchantable quantity and commercially valuable at the date of said school-land grant, and further found, from geological conditions and from certain "disclosures" which antedated said school-land grant of June 21, 1898, although said disclosures had not at that date been operated or developed and no coal had been produced therefrom, nevertheless said S. W. ¼ of N. E. ¼ of said section 16 was *known* to be coal land at the date of said school-land grant, notwithstanding the established fact that under the decisions of the Land Department and of the courts which obtained at the date of said school-land grant of June 21, 1898, no such evidence as was in this case would or could have warranted a decision that said tract was, at that date, *known* to be coal land; that no finding was made in said decisions that, at the date of said school-land grant of June 21, 1898, there had ever been any coal production whatever from said S. W. ¼ of the N. E. ¼ of said section 16, and no such finding could have been made upon the record, because there was no evidence therein even tending to show such a fact, so as to impress said tract with a *known* coal character, within the meaning of the law as then understood and interpreted; that the only fact relied upon in said decision to support the conclusion that said tract was *known* coal land at the date of said school-land grant was that certain "disclosures" which *now*, not *then*, indicated that a coal bed underlies a portion of said tract, a fact which, even if it had been *known* at the date of said grant, would not have been sufficient, under the law as at that date construed and interpreted, to render said tract *known* coal land, so that said *conclusion* in the decision of the Secretary of the

Interior of October 4, 1915, that said S. W. ¼ of the N. E. ¼ of section 16 was *known* to be coal land at the date of said school-land grant, was purely an arbitrary one, not based upon any evidence in the record, and was a *non sequitur* from the findings of fact therein made, and said Secretary of the Interior was without authority or jurisdiction to announce such a conclusion upon the findings of fact which he made in said decision, and such conclusion was wholly *ultra vires*, and was an attempted denial of the vested right of the State of New Mexico to said tract of land which had been granted to the Territory by said school-land grant of June 21, 1898; that counsel for the State of New Mexico thereafter filed a motion for rehearing of said decision of October 4, 1916, but the same was denied by decision of the Department of December 24, 1915, and the previous decision adhered to; that thereafter such proceedings were taken by the Commissioner of the General Land Office as resulted in a final certificate issuing to the coal-land applicant to said S. W. ¼ of N. E. ¼ of said section 16, and the same would have resulted in the issue of a patent to said coal-land applicant for said tract but for the filing of this bill of complaint herein.

Copies of each and all of said decisions of the Commissioner of the General Land Office and of the Secretary of the Interior, as well as of the briefs of counsel for the State of New Mexico before the Secretary of the Interior, are attached to the bill as exhibits and made part thereof.

The bill prays, among other things, for an adjudication by this court that the title to said S. W. ¼ of the N. E. ¼ of said section 16, in township 15 north, of range 18 west, New Mexico principal meridian, was immediately vested in fee in the Territory of New Mexico at the date of said school-land grant of June 21, 1898, and has become vested in fee in the State of New Mexico, as the successor in title and interest of said Territory; that the title to said tract having so vested, and being now so vested in the said State, the Com-

missioner of the General Land Office and the Secretary of the Interior, the defendants herein, have not since the date of said school-land grant, and have not now, any power or authority to interfere with the fee simple title of the State of New Mexico to said tract; and for a writ of injunction restraining the defendants, and each of them, from executing their said former orders and decisions relative to said tract, and from issuing a patent thereon to said coal-land applicant, or in any way clouding the title of the State to said tract, to its detriment and harm.

The defendants, in answer to the rule to show cause, which was issued by this court on April 3, 1916, have filed a motion to dismiss the bill, for reasons set forth therein, in which it is contended (1) that the court has no jurisdiction to grant the relief prayed for in the bill, because the United States is a necessary party; (2) that the State of New Mexico has not now, and never has had any title, interest, or claim in or to the land constituting the subject-matter of this suit, for the reason that at the date of said school-land grant of June 21, 1898, the land was known to be valuable for the deposit of coal contained therein, and was therefore not intended to be, and was not in fact, granted to the Territory of New Mexico, the predecessor of the State of New Mexico, by said act, nor was it granted by any subsequent act of Congress; (3) that full and complete inquiry has been made by the Interior Department into the character of the land involved, and the Secretary of the Interior and the Commissioner of the General Land Office, and the register and receiver of the local land office, have all found the facts to be that, at the date of the passage of said act of June 21, 1898, the particular tract of land involved in this suit was known to be valuable for the mineral contained therein, as fully shown by the exhibits attached to the bill; (4) that the coal-land applicant mentioned in said bill is an indispensible party to the suit; (5) that the bill is in other respects uncertain, informal, and insufficient, and does not state facts sufficient to entitle the State of New Mexico to any relief.

ARGUMENT.

At the outset of this argument, it is conceded that the jurisdiction of this court hinges upon the proposition of law, on which the complaint is based, to-wit, that the title to the land in question passed out of the United States and into the Territory of New Mexico under and by virtue of the school-land grant to that Territory of June 21, 1898; and that the Interior Department thereafter lost jurisdiction thereof, save and except to inquire into the question of the known character of the land, whether coal or non-coal, at the date of said grant; and that inasmuch as the Interior Department has made such examination and inquiry, and has found *as a fact* that the characteristics of the land at said date were such as to show that it was not *known* coal land at said date, under the law as then construed, title thereto passed to, and became vested in, said Territory, and is now in the complainant, as successor to the Territory, notwithstanding the unauthorized and arbitrary *conclusion of law* of the Secretary of the Interior, from the facts as found by him, was, that it was *known* coal land at the date of said school-land grant.

The theory of the bill is, that, while the complainant accepts the findings of the Secretary of the Interior *on the facts,* and does not ask a review thereof by this court, nevertheless, the *conclusion of law,* upon those facts, was erroneous, unauthorized, and illegal, and that, unless restrained by this honorable court, the Secretary of the Interior and the Commissioner of the General Land Office, acting under his direction, will proceed to carry out the final directions of the former and issue a patent to a coal claimant; and that said erroneous and illegal conclusion of law is a matter which this court can review in a proceeding of this kind, the Interior Department having made its final decision in the case.

The defendants must stand or fall upon their contention that, as a matter of law, the title did not pass from the United States at the date of said school-land grant.

I.

Jurisdiction.

The first specification of the motion to dismiss reads as follows:

> "First. That this court has not jurisdiction to grant the relief prayed for in this bill because the United States is a necessary party. It appears from the bill that the legal title to the land involved is in the United States, and that it is the purpose of the defendants to dispose of the land in accordance with the provisions of the mineral land laws of the United States. If, therefore, the court should grant the prayer of the bill and enjoin the defendants from carrying out their purpose, the United States would be deprived of the purchase price of the land."

This specifictaion, while not directly putting in issue the right of the complainant to bring a suit against the officials of the Interior Department, the Secretary, and the Commissioner of the General Land Office, nevertheless, in effect, challenges that right by declaring that the United States is a necessary party to the bill, and that the present defendants, having no personal interest in the matter, but acting only as the representatives of the United States, are not necessary parties; and that, upon the theory that the United States cannot be sued without their consent, and have not consented to be sued in a matter of this kind, therefore the bill should be dismissed.

The theory of the complaint is, that the defendants, as citizens of certain States of the Union, while occupying the official positions respectively of Secretary of the Interior and Commissioner of the General Land Office, have declared their purpose and are about to perform acts which are in violation of law. Reference to their official positions in the caption of the bill is merely descriptive, and the form of the

bill in this regard is conformable to the course pursued in the case of *Noble vs. Union River Logging Railroad Company,* 147 U. S., 165, which was a suit against the then Secretary of the Interior and the then Commissioner of the General Land Office by the appellee; also in the case of *Davis vs. Gray,* 16 Wall., 203, wherein the suit was brought by the appellee against the Governor of the State of Texas and the then commissioner of the land office for that State. Both of these cases are cited below as applicable to the questions involved in this case.

The question of jurisdiction, therefore, meets us on the threshold of this investigation. It is contended by the defendants that this court is without jurisdiction to entertain this suit for the reason, as claimed, that it is a suit against the United States, and further, in effect, that the United States has not consented to be sued in this proceeding. No authorities are cited in support of the defendant's contention on this point.

According to the theory of the present bill, and as will be clearly established in a subsequent part of this brief, the title to the land here in controversy has, by act of Congress passed out of the United States and is now in the State of New Mexico, and that the title so conveyed is no longer subject to attack by or on behalf of the Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective, or ultimate interest in the land whatsoever.

If, therefore, the theory of the present bill be correct, and if this court shall find, as we think it must find, that the legal title to the land in dispute has passed out of the United States and is now in the State of New Mexico, then it is contended on behalf of the complainant that there cannot be any doubt of the jurisdiction of this court to entertain the suit; and the correctness of this contention will now be demonstrated.

The Suit Properly Brought.

It is believed that the question herein has been virtually and effectually settled in favor of our contention. In the consideration of the authorities on the subject, it is important to mark the distinction between what are called political powers and such as are purely ministerial. It is well settled that in the exercise of discretionary or political powers, courts will not undertake to control the action of executive officers; but not so with regard to ministerial duties, or where an executive officer is undertaking to act without and beyond the scope of his powers and authority, for no one is above the law, however exalted his position may be. The Secretary of the Interior and the Commissioner of the General Land Office are but creatures of the law, and mere agencies created by the law to carry it into practical operation; and it would be indeed strange if they, or either of them, should be permitted to exert his agency in violating the law and the Constitution, and then claim exemption from the process of the court, whose duty it is to guard against abuses, on the ground that they are executive officers of the Government and cannot be restrained from violating the law.

It is said, in effect, by the defendants, that there are no proper and competent parties before the court as defendants in this case. This is a very narrow view of the subject. It is true that the Constitution does not specifically and *in totidem verbis* provide that this court shall have original jurisdiction of a case in which a State is plaintiff and executive officers of the United States who are attempting to exercise authority and power not given them by the law and not warranted by the law are defendants; but it does provide that a State shall have a judicial remedy in this court, under its original jurisdiction, against individuals, citizens of other States, who are beyond the reach of its own power and process, who do it an injury or who undertake to do it an injury in its *property* rights. This is a right given a State by the

Constitution, and this is the court of first instance into which the State is to come.

The doctrine is firmly established, by repeated decisions of this court, that executive officers of a State, or of the United States, may be proceeded against by mandamus when they refuse to execute a ministerial duty imposed upon them by law, wherein no political rights are involved and wherein they are not vested with any further discretion in the matter in hand; and it is equally well settled that such officers may be proceeded against by writ of injunction when they are assuming to act under an unconstitutional statute, or are assuming to act without authority of law and in violation of the law, where there is no adequate remedy at law, and where the complainant will suffer irreparable injury thereby, or where an injunction is the only remedy that can be invoked to avoid a multiplicity of suits.

In the great case of *Marbury vs. Madison*, 1 Cranch, 137, it was specifically held that a mandamus would issue at the suit of an individual to compel the Secretary of State to deliver a commission which had been issued to the relator and which that officer refused to deliver to him, even though the Secretary of State was acting under the express directions of the President of the United States. The question was elaborately considered by Chief Justice Marshall, who delivered the opinion of the court, and in the course of the opinion (pp. 170-171), it was said:

> "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process.
>
> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done,

that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as, for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

There have been very many cases decided by this court involving the same general principle, in all of which the doctrines of *Marbury vs. Madison* have been applied, and the question is no longer open to argument. A review of many of the cases will be found in the opinion in the case of *Noble vs. Union River Logging Company*, 147 U. S., 165, 171, delivered by Mr. Justice Brown, and it was there said:

"The principle of this case (*Marbury vs. Madison*) was applied in *Kendall vs. Stokes*, 12 Pet., 524, and the action of the circuit court sustained in a proceeding where it had commanded the Postmaster General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In *Decatur vs. Paulding*, 14 Pet., 497, a mandamus was refused upon the same principle, to compel the Secretary of the Navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed,

the reports of this court abound with authorities to the same effect. *Kendall vs. Stokes,* 3 How., 87; *Brashear vs. Mason,* 6 How., 92; *Reeside vs. Walker,* 11 How., 272; *Commissioner of Patents vs. Whiteley,* 4 Wall., 522; *United States vs. Guthrie,* 17 How., 284; *United States vs. The Commissioner,* 5 Wall., 563; *Gaines vs. Thompson,* 7 Wall., 347; *The Secretary vs. McGarrahan,* 9 Wall., 298; *United States vs. Schurz,* 102 U. S., 378; *Butterworth vs. Hoe,* 112 U. S., 50; *United States vs. Black,* 128 U. S., 40. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced."

The majority of the cases in this court in which an executive officer has been enjoined from executing an unconstitutional statute, or where such officer has been proceeded against on the ground that he is acting or assuming to act beyond the scope of his authority in derogation of the rights of complainants guaranteed to them by the law, have been cases against State officials. *Osborn vs. Bank of United States,* 9 Wheat., 738; *Davis vs. Gray,* 16 Wall., 203; *Board of Liquidation vs. McComb,* 92 U. S., 531; *Poindexter vs. Greenhow,* 114 U. S., 270; *Allen vs. Baltimore & Ohio Railroad Company, Ib.,* 311 (these last two being known as the *Virginia Coupon Cases*); *Pennoyer vs. McConnaughy,* 140 U. S., 1; *Stanley vs. Schwalby,* 147 U. S., 508; *Tindal vs. Wesley,* 167 U. S., 204; *Scott vs. Donald,* 165 U. S., 58; *Scott vs. Donald, Ib.,* 107; *Smyth vs. Ames,* 169 U. S., 466; *Prout vs. Starr,* 188 U. S., 537; *Ex parte Young,* 209 U. S., 123, and cases cited and referred to in the opinions in those cases.

In practically all of the cases just referred to, the defense interposed was that the suit was one against the State itself, in violation of the eleventh amendment to the Constitution. But it was pointed out by this court in the opinions in those cases that such defenses were unsound, and that the suits were not against the State, but were against its officers, who were assuming to act under an unconstitutional statute or were assuming to act *ultra vires* to the great and irreparable injury and damage of the complainants in their property rights.

It will subserve no useful purpose to review all of the cases referred to on this point, as to do so would unnecessarily prolong this brief; and, moreover, this court is perfectly familiar with them. Particular reference will be made to only a few of them, as illustrating the principles which govern this case.

The leading case is *Osborn vs. Bank of the United States*, 9 Wheat, 738. That was a suit in equity brought in the Circuit Court of the United States for the District of Ohio by the United States Bank against Osborn, auditor of the State of Ohio, and others, to restrain and enjoin the collection of a tax levied under a statute of Ohio, which was alleged to be unconstitutional. The circuit court issued the writ, and the defendants appealed to this court, which affirmed the decree below. In passing upon the question of the right of the complainant to bring the suit, and as to whether there were proper defendants, this court, speaking by Chief Justice Marshall, said:

> "The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a court of chancery.
>
> "In examining this question, it is proper that the court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the State of Ohio, to restrain him from executing a law of that State, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the Constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a State officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnished no authority or protection to the officer who is about to proceed under it." (9 Wheat., 838).

And again:

> "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit.
>
> "This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power, and for whose advantage, it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent, for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?" (*Ib.*, 842-843).

After a further discussion of this question in all its bearings, the court continued:

> "It was proper, then to make a decree against the defendants in the circuit court, if the law of the State of Ohio be repugnant to the Constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted" (*Ib.*, 859).

In *Poindexter vs. Greenhow, supra,* Mr. Justice Matthews, speaking for the court, and referring to the distinction between a suit against a State in violation of the eleventh amendment, and a suit against the officers of a State who were acting or assuming to act under an unconstitutional act of its legislature, said (114 U. S., 288):

> "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act."

The court then found that the statute under which the defendant was assuming to act was unconstitutional, and, referring to the defense set up that the defendant was acting under that law, the court said:

> "He stands, then, stripped of his official character; and, confessing a *personal* violation of the plaintiff's rights for which he must *personally* answer, he is without defense." (Italics supplied.)

Pennoyer vs. McConnaughy, supra, was a suit in equity against the board of land commissioners of the State of Oregon, composed of the Governor, Secretary of State and Treasurer of State, by a citizen of California, to restrain and enjoin them from selling and conveying a large quantity of land to which he asserted a good title under a contract with the State, and in that respect is very much akin to the case under consideration. The defense there was that the suit was one against the State, just as here it is that the suit is against the United States; but this court held that it could

go into the record to ascertain who was the real defendant, and, finding that the statute of Oregon under which the board of land commissioners was assuming to act, was unconstitutional, in that it took from the complainant his property without due process of law, and in violation of his contractual rights, decided that the suit was not against the State, but was one against the defendants in their individual capacity. The opinion in that case was delivered by Mr. Justice Lamar. After referring to a class of cases in which it had been held that the suits were suits against a State, and therefore violative of the eleventh amendment, he (p. 10) said:

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the eleventh amendment, an action against the State." Citing a long list of authorities.

Among the cases cited and referred to in the opinion of Mr. Justice Lamar was that of *Board of Liquidation vs. McComb*, 92 U. S., 531, 541, the opinion in which was delivered by Mr. Justice Bradley, and in which it was said:

> "The objections to proceeding against State officers by mandamus or injunction are: First, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot

substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; *and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.* In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void," citing numerous cases. (Italics supplied.)

In *Tindal vs. Wesley*, 167 U. S., 204, 221, Mr. Justice Harlan, speaking for the court, said:

> "The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf."

And again (p. 222):

> "But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be

> not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State."

Scott vs. Donald, Smyth vs. Ames, and Ex parte Young, supra, and the cases therein cited, referred to, and quoted from, are but different applications of the same general principles announced in preceding cases, and establish beyond controversy the general doctrines which are contended for in this brief. In the case last cited, Mr. Justice Peckham, delivering the opinion (209 U. S., 155-156) said:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

While the cases just referred to were against State officers and were held to not be cases against the State, the same principles apply in similar cases against officers of the United States who defend upon the ground that they are such officers. They must make good their defence and show that they are proceeding under the law, and not in violation of it. As said by Mr. Justice Harlan, in delivering the opinion in *Tindal vs. Wesley,* 167 U. S., 204, 213: *"But it cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."*

See also *Marbury vs. Madison, supra; United States vs.*

Lee, 106 U. S., 196; *Noble vs. Union River Logging Company, supra*, and cases there cited.

That an injunction is the proper remedy against an official of the United States, even though he be the Head of a Department, where such officer is undertaking to act *ultra vires* and beyond the scope of his authority, and is violating or attempting to violate the law, to the injury and damage of the complainant, is firmly established by the decision in *Noble vs. Union River Logging Company, supra*, in which, after referring to the cases in which mandamus had been issued against the Head of a Department to compel the performance of a duty purely ministerial, the court (147 U. S., 171-172) said:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

The case of *United States vs. Lee*, 106 U. S., 196, in many respects, is identical with this case—in all respects, in fact, with the exception that that was an action of ejectment against officers of the United States who had no personal interest in the subject matter of the controversy, but were in possession of the property simply *as* officers of the United States, under directions of their superior officers; whereas, this is a suit in equity for an injunction to prevent certain officials of the United States from issuing a patent therefor to another party, thereby clouding complainant's title thereto. In that case the complainant sought to recover real property wrongfully withheld from him by the United States officers under an illegal tax sale and illegal executive orders. In this case the complainant seeks to prevent the sale of its

property by and under the direction of United States officers, under equally illegal executive orders. In that case, the United States officers had no personal interest in the subject of the action. In this case, the officers against whom this suit is brought have no personal interest in the subject of the suit. In that case, the defendants claimed to be acting under the direct authority of the United States, and the defence was that the United States was the real defendant as the owner of the *res*. In this case the defence is that the suit is virtually against the United States, and that the United States is the owner of the *res*. The defence in that case was found by this court to be bad, for the reason that the United States did not own the property for which restitution was asked. In this case, if our contention be sustained, as we feel that it must be, that the title to the lands in dispute has passed out of the United States and become vested in the plaintiff, then the United States has no interest in the subject-matter of the suit. Hence, for all practical purposes the parallel is complete. This case is on all fours with that of *United States vs. Lee*. The similarity of this case to the Lee case being thus established, and the identity in principle of the questions involved in both cases being shown to exist, the following quotation from the opinion of the court, delivered by Mr. Justice Miller, in the *Lee case* should govern this court in reaching a conclusion in the present case, dealing, as it does, with all the preceding leading cases on the same subject, viz. (pp. 210-213):

> "The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set

aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

In referring to the distinction between the English and American doctrine as to the suability of government officials, the court (pp. 208-209) said:

> "Under our system the *people*, who are there (in England) called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

Again (pp. 219-221), the court said:

> "What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.
>
> "It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the Government, however clear it may be made that the

executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

"These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the Government. See *Ex parte Milligan*, 4 Wall., 2; *Kilbourn vs. Thompson*, 103 U. S., 168.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government; and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been de-

> prived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?
>
> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.
>
> "It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'Stop here, I hold by order of the President,' and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

On the same general question of the claimed immunity of officers of the Government from suit wherein the defence is that they are such officers, the following eloquent and forceful language of Mr. Justice Matthews, in delivering the opinion of this court in *Poindexter vs. Greenhow*, 114 U. S., 270, 290, 291, is particularly applicable:

> "In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily

the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in *Langford vs. United States*, 101 U. S., 341, that the maxim, that the king can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. * * *

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say *'L' Etat c'est moi.'* Of what avail are written constitutions whose bills of rights for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of

law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon *individual offenders*, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the double progeny of the same evil birth." (Italics supplied.)

It results, from a full consideration of the cases cited and quoted from, that there cannot be any doubt of the proposition that in a proper case the Secretary of the Interior and the Commissioner of the General Land Office may be proceeded against by writ of injunction to restrain and enjoin them from destroying the evidence of title of a complainant in their custody and in disposing of what had been public lands but whose title had theretofore passed beyond their jurisdiction either by the issue of a United States patent or by a legal conveyance, the equivalent of such patent; for it is elementary law in land jurisprudence that, after the passing of title out of the United States, the officials of the Land Department have become *functus officio* in respect of such lands. And it follows therefrom that when the title to public lands has passed out of the United States and into a State and the statute of limitations for recovery has run, as is the case here, the United States cannot longer be considered and held to have any interest therein, and that a suit against the executive officers of the Government, charged with the duty of protecting and caring for the public lands, who are still insisting that they have jurisdiction over such lands and are asserting the right to sell and dispose of them as public lands, is not a suit against the United States, but, on the contrary, is a suit against those officers as individuals;

and they can only defend by showing power and authority of law for the proposed action which, as will be shown, they have no power or authority of law to sanction or permit.

It was well said by Mr. Chief Justice Fuller, in *Stanley vs. Schwalby*, 147 U. S., 508, 518:

> "In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence *he must show that his authority was sufficient in law to protect him.*" (Italics supplied.)

Supreme Court Has Original Jurisdiction.

The sole question remaining to be considered on this branch of the case is, therefore, Can this court entertain this suit under its original jurisdiction? This question must be answered in the affirmative.

The Constitution, article III, section 2, provides that:

> "The judicial powers shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States; * * * to controversies * * * between a State and citizens of another State. * * * In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which *a State shall be Party, the Supreme Court shall have original jurisdiction.*" (Italics supplied.)

It is firmly settled by repeated decisions of this court that, under the provision of the Constitution, a State may bring an original suit in this court against a citizen of another State. Thus, in *United States vs. Texas*, 143 U. S., 621, 644, it was said:

> "It must be conceded that a State can bring an original suit in this court against a citizen of another State."

In *Wisconsin vs. Pelican Insurance Company*, 127 U. S., 265, 287, it was said:

"By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State."

In *Minnesota vs. Hitchcock*, 185 U. S., 373, 388, it was said:

"Our conclusion, therefore, is that the original jurisdiction vested by the Constitution in this court over controversies in which a State is a party is not affected by the question whether the State is party plaintiff or party defendant."

In *Pennsylvania vs. Wheeling Bridge Company*, 13 How., 518, 560, it was said:

"From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court."

And Chief Justice Taney, in his dissent in that case (p. 579) said:

"Pennsylvania, as a State, has the right to sue in this court."

In *Mississippi vs. Johnson*, 4 Wall., 475, 501, the court said:

"It is true that a State may file an original bill in this court."

In *Texas vs. White*, 7 Wall., 700, 719, the court said:

"It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States."

In *Pennsylvania vs. Quicksilver Company*, 10 Wall., 553, 556, the court said:

"A State, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another State." (in this court.)

See, also, *State of Florida vs. Anderson*, 91 U. S., 667.

Tested by the language of the Constitution and by the decisions just cited, it is difficult to perceive the slightest objection to the jurisdiction of this court in the present case. The case, as made by the bill, is one in which the State of New Mexico has a substantial interest in the lands which are the subject-matter of the suit. According to the bill, and as will be fully shown hereafter in this brief, the land in controversy is not the property of the United States, the title to it having passed out of the United States into the State. The defendants named in the bill, although Government officials, are strictly speaking not sued as such, for the all-sufficient reason that, as such officials, they are *functus officio* as regards the subject-matter of the bill, and do not have and cannot lawfully have any official jurisdiction over such subject-matter, and are, therefore, sued as individuals who, under the cover of their official authority, are unlawfully assuming to exercise a jurisdiction over the land, which they do not have. They, as individuals, without any authority or jurisdiction over the land in controversy, are citizens of States other than New Mexico. The State of New Mexico is certainly a proper party. Hence, all the requirements of the Constitution in this regard have been met. In respect to their status *as defendants,* the defendants herein occupy the exact status of the defendant in *Noble vs. Union River Logging Company, supra;* and their status, as defendants, cannot be distinguished in principle from the status of the defendants in *United States vs. Lee; Davis vs. Gray; Marbury vs. Madison; Pennoyer vs. McConnaughy; The Virgina Coupon Cases; Osborn vs. Bank of the United States; Smyth vs. Ames; Scott vs. Donald,* and a host of other similar cases cited and referred to in the decisions of those cases. In none of those cases to which reference is made did the defendants, who were either State officials or officials of the United States, have any personal interest in the suits or the subject-matter thereof in which they were defendants. Indeed, the very ground of their

defences was that they did not have any personal interest therein, but were acting as the agents or representatives of their Government. But this court, in all of those cases, held such a defence to be bad, and gave judgment against those defendants in the several cases, *as individuals,* upon the ground that they could not shield themselves behind their respective governments when they were acting or assuming to act, under color of their office, beyond and outside of their authority as defined by the law.

That is all there is to this case on this point. The defendants to this bill, according to the theory of the bill (which on motion to dismiss must be assumed to be correct), do not have and can never have any jurisdiction of any kind or character over the land which is the subject-matter of the suit. Neither of them can have or assert any authority over, or make any order, rule, or regulation concerning this land. The United States does not have any interest, present or prospective, in the land. Under these circumstances, therefore, how can it be said that these defendants, when they assume, in their official capacity, an authority and jurisdiction over this land which they do not possess, and declare their purpose to patent it as public land, and, under color of their offices, undertake to shield themselves behind the Government of the United States, cannot be proceeded against by injunction to restrain them from committing a wrong against the State of New Mexico in respect to its property? And how can it be said that the State of New Mexico, in the face of the multitude of decisions of this court holding that executive officers can be sued *as individuals* when they are assuming to act beyond the scope of their legal authority, cannot sue these defendants *as individuals?* If they are suable *as individuals* (and this has been demonstrated), then how can it be said that their citizenship, if necessary, cannot enter into consideration in determining whether this court can entertain original jurisdiction in this case?

The cases of *Minnesota vs. Hitchcock,* 185 U. S., 373, and

Oregon vs. Hitchcock, 202 U. S., 60, in which the suits were brought against the Secretary and the Commissioner of the General Land Office, by name, are unlike this for the reason that in both of those cases the title to the lands, which were the subject-matter, was still in the United States, whereas, as will be shown later on in this brief, the title to the land involved in this case has passed out of the United States, and the United States does not have any interest, either present or prospective, in them. Hence, these cases on this question of jurisdiction have no bearing at all on this case. It is a significant fact, however, that in the *Minnesota-Hitchcock* case so eminent a lawyer as the then Assistant Attorney-General for the Interior Department, Mr. Van Devanter, now an Associate Justice of this court, did not object to the jurisdiction of this court on the ground that the Secretary of the Interior and the Commissioner of the General Land Office could not be made defendants to a suit brought under the original jurisdiction of this court by one of the States of the Union; and the fact that he did not raise any objections on that score to the suit in that case is the best evidence that can be found that he did not consider it an objection worthy of consideration. Likewise, in the case at bar, if the position of eminent counsel for the defendants is understood, their objection to the jurisdiction of this court is based upon grounds other than the citizenship of the defendants.

So, also, the case of *Louisiana vs. Garfield*, 211 U. S., 70, relied upon by the defendants, though somewhat similar to the case at bar, is, upon careful examination, shown to be entirely different, in that in that case the court found that there were questions of law and fact still to be determined by the Interior Department, and therefore the United States was a necessary party to the suit; whereas, if the theory of the present bill is correct, as it is believed to be, there is no question whatever in the case at this time for the Interior Department to determine, that Department having made its

final decision in the case, and the suit is brought to prevent the Secretary of the Interior and the Commissioner of the General Land Office from executing *that* decision, which is claimed to have been illegal, on the facts as found by the Secretary.

The case of *State of Georgia vs. Stanton,* 6 Wall., 50, in some respects, is somewhat like this, although not wholly so. In that case the State of Georgia filed an original bill in this court, under its original jurisdiction, against Edwin M. Stanton, Secretary of War; General Grant, General of the Army, and Major-General Pope, assigned to the command of the Third Military District, consisting of Georgia and other Southern States, for the purpose of restraining them from carrying into execution the several provisions of what were known as the "Reconstruction Acts." As appears from the report of the case, the original jurisdiction of this court was invoked on the ground that the defendants were each and all citizens of States other than Georgia. The bill was dismissed on the ground that the case, as made thereby, was one involving *political rights* of the State, and *not its property rights,* and that, therefore, this court did not have jurisdiction to consider or adjudicate *political* rights of the State. It is apparent, however, from a perusal, not only of the opinion of the court but also of the briefs on both sides, that had the case involved *the property rights* of the State, and had the relief sought been to protect those rights, an entirely different conclusion would have been reached. In fact, one cannot doubt, from a thorough consideration of the case as reported, that had the case been one involving the *property rights* of the State, and had the relief sought been to protect the property of the State, as in the case at bar, the court would have entertained the suit.

It has been shown by a long line of authorities that an official violating his authority, State or Federal, to the detriment of property rights of others, may be sued individually, and cannot be sued otherwise than as an individual. There-

fore this suit, in theory and in fact, is against defendants Lane and Tallman as individuals, based upon unlawful acts and purposes while in office. There is no law which requires either of them to give up their respective citizenship in California and Nevada upon their acceptance of office. This court will take judicial notice of the laws of those States which permit them to retain their citizenship therein and to exercise the right of franchise and other rights appropriate to citizenship. Their diverse citizenship is averred in the bill and, in legal effect, is admitted by the motion to dismiss.

Article III, section 2, of the Constitution provides that:

> "The judicial powers shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States; * * * controversies * * * *between a State and citizens of another State;* * * * In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which *a State shall be Party, the Supreme Court shall have original jurisdiction.*" (Italics supplied.)
>
> See *Cohens vs. Virginia*, 6 Wheat., 264, 378, 392, 395, 398.

Therefore, in the very language of the Constitution itself, this court has jurisdiction, if our contention is correct that the title to the land in dispute passed out of the United States under and by virtue of the school-land grant of June 21, 1898, inasmuch as, *on the facts* as found by the Secretary of the Interior, it was not *known* coal land, as will be hereafter shown.

II.

Title in State; Defendants Without Jurisdiction.

Concisely stated, the first three paragraphs of the motion to dismiss, aside from what has been heretofore considered, amount simply to this contention:

That the land in question was not granted to the Territory

of New Mexico by the school-land grant of June 21, 1898, but that the legal title thereto still remains in the United States, for the reason that the local officers, the Commissioner of the General Land Office, and the Secretary of the Interior, have all found, *as a fact*, that, at said date, it was *known* coal land, which findings cannot be reviewed by the courts, but must be accepted as a finality.

If this contention be sound, of course, it would end the case, and the bill should be dismissed. But it is unsound and incorrect. According to the theory of the bill of complaint, none of those officials ever made any such *finding of facts* in this case. What was actually found by the local officers and the Commissioner, *as facts*, are set out in full on pages 14 and 15 of the bill, and the entire decision of the Commissioner is set out in full as Exhibit "A" to the bill, and hence will not be repeated here, those findings not being the final findings or action of the Interior Department. It is sufficient, perhaps, to say that neither the local officers nor the Commissioner found, *as a fact*, that there had been any coal development or mine opened on the particular tract which is the subject-matter of this suit, at the date of the school-land grant of June 21, 1898, or at any time prior thereto, or up until 1911, thirteen years after the school-land grant had vested in the Territory; and, therefore, as will be hereafter shown, any *conclusion* announced by those officials, or either of them, from the *facts* as found by them, that the land was *known* coal land at the date of said grant, was not warranted from the facts *as found*, but was simply a misstatement of the *law* applicable to such facts.

Let the facts as found by the Secretary of the Interior, his decision being the final action of the Interior Department on this question, be considered. The whole of the decision of the Secretary is set out in full as Exhibit "B" to the bill, and a careful perusal and consideration of it at this stage of the proceedings is suggested to the court. That decision, however, as will be observed from such perusal, dealt with *three*

tracts of land, to wit, the N. E. ¼ and the S. E. ¼ of the N. E. ¼ of section 16, as well as the tract here in controversy, viz., the S. W. ¼ of said N. E. ¼ of the section, and much of what is said therein relates to said two former tracts, those two tracts being found by the Secretary to be non-coal in character, although the local officers had found them to be coal land, while the Commissioner had found one of them to be coal and the other non-coal land. Hence, in order to not confuse the record, inasmuch as only the S. W. ¼ of the N. E. ¼ (40 acres) of said section is here involved, the actual findings of fact of the Secretary, as to the particular tract, and those only, will be, for convenience of reference, set out in full herein.

They are as follows:

> "The land in controversy was not returned as coal land by the surveyor and it does not appear that at the date of the grant any valid claim was being asserted thereto under the coal-land laws. It is true that as early as 1883, and thereafter, coal declaratory statements had from time to time been filed on the N. E. ¼ of said section 16, and on January 5, 1898, a coal filing was made therefor by one Katherine Leaden. Those filings, however, were all abandoned and it does not appear that any attempt was made on the part of Leaden to open or improve a mine of coal on the land or any portion thereof, or to purchase the land under the coal-land laws. Presumptively, therefore, the title to the land passed to the Territory of New Mexico at the date of the grant, and this presumption can only be overcome by the submission of satisfactory proof that the land was *known* to be coal in character at that time."

Then, commenting on the testimony taken at said hearing regarding geological conditions affecting said S. W. ¼ N. E. ¼ of said section 16, the Secretary, in said decision, found and said:

> "The Black Diamond bed, which is approximately five feet thick, outcrops or is otherwise exposed in the

extreme northwest corner of the N. E. ¼ N. E. ¼, which it underlies to the extent of something less than an acre, and also in the southeast portion of the S. W. ¼ N. E. ¼. The easterly line of the crop between these points is concealed by a mass of wash and detritus to a depth of from 90 to 150 feet, but is shown to extend in a northerly and southerly direction through the eastern portion of the S. W. ¼ N. E. ¼. These disclosures antedate the grant to the State and establish the existence of the bed within the limits of the S. W. ¼ N. E. ¼ prior thereto."

These were the only specific *findings of fact* made by the Secretary of the Interior in his said decision of October 4, 1915, regarding the *known* coal or non-coal character of said S. W. ¼ of N. E. ¼ of said section 16 at the date of said school-land grant; but, nevertheless, upon said findings of fact, and those only, said decision declared, *as a conclusion of law*, that—

> "As to the S. W. ¼ N. E. ¼, the evidence, in the opinion of the Department, fully warrants the conclusion of the local officers and the Commissioner that the land is coal in character and was known to be such at the date of the grant."

No finding was made in said decision that, at the date of said school-land grant of June 21, 1898, there had been any coal production or extraction from said S. W. ¼ of the N. E. ¼ of said section 16, or any mine opened thereon, and no such finding could have been made upon the record, because there was no evidence therein even tending to show such a fact or facts, so as to impress said tract with a *known* coal character, within the meaning of the law as then understood and interpreted; and the only fact relied upon in said decision to support the conclusion that said tract was *known* coal land at the date of said school-land grant was that certain "disclosures" which then and now exist on the land, *now*, not *then*, indicate that the Black Diamond coal bed underlies a portion of said tract, a fact which, even if it had been *known*

at the date of said grant, would not have been sufficient, under the law as at that date construed and interpreted, to render said tract *known* coal land. So that said *conclusion* in the decision of the Secretary of the Interior of October 4, 1915, that said S. W. ¼ of the N. E. ¼ of section 16 was "known" to be coal land at the date of said school-land grant, was purely an arbitrary one and an unwarranted exercise of his power and authority, was not authorized by any evidence in the record, and was a *non sequitur* from the findings of fact therein made; and he was without authority or jurisdiction to announce such a conclusion upon said findings of fact and the evidence in the record. Such conclusion, therefore, was wholly *ultra vires*, and without any authority of law to support it, and was an attempted denial of the vested right of complainant to said tract which had been granted to and become *vested* in it by said act of June 21, 1898.

Distinction Between Findings of Fact and Conclusion of Law.

The distinction between *findings of fact* and the *conclusion of law* drawn from the findings must always be borne in mind; and that distinction is so obvious and so clearly expressed in the Secretary's decision as to enable the court to make no mistake regarding it.

Counsel for the complainant are aware of the general rule that a finding by the Head of the Interior Department on a pure question of fact, where he has the jurisdiction to make it, is to be accepted in all other tribunals. The authorities in support of this proposition are many, and its correctness will not be disputed here.

In *Baldwin vs. Stark*, 107 U. S., 463, 465, the doctrine as to the finality of findings of fact by the Interior Department was announced by Mr. Justice Miller, speaking for the court, as follows:

> "It has been so repeatedly decided in this court, in cases of this character, that the Land Department is a

tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practised on the party interested, or on the officers of the law, or *where these latter have clearly mistaken the law of the case as applicable to the facts*, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. *Johnson vs. Towsley*, 13 Wall., 72; *Gibson vs. Chouteau, Id.*, 92; *Shepley vs. Cowan*, 91 U. S., 330; *Marquez vs. Frisbie*, 101 U. S., 473."

Counsel are also aware of the general proposition that where there is a mixed question of law and fact, which cannot be so separated as to determine clearly where the mistake of law is, the decision of the Department thereon is conclusive; but it is equally true that where it can be made entirely plain that on facts about which there is no dispute, or any reasonable doubt, and the Department has, by a mistake of the law, announced an *illegal conclusion* not warranted by such facts, such conclusion and judgment of the Department is not final, but may be corrected by the courts in a proper proceeding. The authorities in support of this proposition are numerous.

Thus, in *Marquez vs. Frisbie*, 101 U. S., 473, 476, referring to a number of its previous decisions as to the finality of a finding of fact by the Land Department, within its jurisdiction, the court said:

> "The language of this court in *Moore vs. Robbins*, cited above, is that equity will interfere 'when it is *clear* that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'
>
> "This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the

mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

"But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

The same principles were announced and the same distinction drawn in *Sanford vs. Sanford*, 139 U. S., 642, 647, where the court said:

> "But where * * * its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. *Quinby vs. Conlan*, 104 U. S., 420, 426; *Baldwin vs. Stark*, 107 U. S., 463, 465."

In *Durango Land & Coal Co. vs. Evans*, 80 Fed., 425, 431, the Circuit Court of Appeals for the Eighth Circuit, in enunciating this same principle, said:

> "This court cannot say that the law was misconstrued by the officers of the Land Department, unless their findings upon questions of fact are disclosed, or enough undisputed facts are disclosed, which were proven before the Department, to make it plain that an error of law was committed, and that the complainant company was thereby deprived of its rights."

The foregoing decisions were cited and quoted from by the Supreme Court of the State of Washington in *Wiseman vs. Eastman*, 57 Pac., 398, 401, and the court then made this pertinent observation:

> "And, inasmuch as the findings of the Land Department on questions of fact are conclusive, when the

charge is that the Land Department has erred in the decision of a mixed question of law and fact, *what the facts were*, as laid before and found by the Department, must be shown, so as to enable the court to see clearly that the law has been misconstrued;" citing numerous authorities.

In *Whitcomb vs. White*, 214 U. S., 15, 16-17, Mr. Justice Brewer, speaking for the court, said:

> "The decision of the Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts. *Johnson vs. Towsley*, 13 Wall., 72, 86; *Shepley vs. Cowan*, 91 U. S., 330, 340; *Marquez vs. Frisbie*, 101 U. S., 473, 476; *Quinby vs. Conlan*, 104 U. S., 420, 425, 426; *Burfenning vs. C., St. P., M. & O. Ry.*, 163 U. S., 321, 323; *De Cambra vs. Rogers*, 189 U. S., 119, 120.
>
> "And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez vs. Frisbie, supra*, p. 476:
>
> "'This means, and it is, a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.' *Quinby vs. Conlan, supra*, 426."

This decision was cited with approval in *Ross vs. Day*, 232 U. S., 110, 116-17.

In *Howe vs. Parker*, 190 Fed., 738, 746, Judge Sanborn, speaking for the court, said:

> "Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of

> the Interior is conclusive in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him *any evidence* to sustain a charge or a finding of fact in support of it is in his, and in every judicial and quasi-judicial tribunal a question of law."

In *Buffalo Land & Exploration Co. vs. Strong,* 97 N. W. Rep., 576, one of the questions considered was as to the validity of a location made of Sioux Half-Breed Scrip in the State of Minnesota. Said scrip not being assignable, the scripee had given a power of attorney to locate it and a second power of attorney to sell the land after location (a proceeding held valid in *Midway Company vs. Eaton,* 183 U. S., 602). In denying the location, the Secretary of the Interior, affirming the decision of the Commissioner of the General Land Office, made the following finding:

> "The evidence in this case shows that prior to the location of said scrip on the land in question there had never been any improvements made thereon by the scripee, nor by anyone authorized by him, nor with his knowledge and consent; that said location was not made in the scripee's interest, as required by the statutes and the regulations of this Department, but that it was made in their own interest, by parties to whom he had in fact assigned said scrip by double power of attorney—one to locate and one to sell—and should be cancelled."

The Supreme Court of Minnesota characterized these findings of the Secretary of the Interior as "alleged findings of fact," and further stated (syllabus by the court) that they—

> "were really not findings upon controverted facts, but amounted to nothing more than conclusions of law, and therefore subject to revision by the courts."

And in the opinion it was said:

> "This paragraph was based upon a misapprehension of the law governing the location of half-breed scrip.

It was found that there had never been any improvements made on the land by Pettijohn (the scripee), nor by anyone authorized by him, nor with his knowledge or consent, simply because he had not personally made the improvements which had been placed on the land prior to the location, and had not personally authorized that they be made. This is evident from the Secretary's reference to the U. S. statutes and to the regulations of the Interior Department—regulations which were wholly unwarranted, because it has frequently been held by the Supreme Court of the United States that necessary improvements may be made on unsurveyed land by a duly authorized attorney in fact in all cases when improvements are a prerequisite to location. That this was done by the substituted attorney, Hoover, is beyond all controversy. The finding that the scrip itself had been sold and assigned by means of the two powers of attorney was also based upon a misapprehension and misconstruction of their legal effect. It was this misconception, and not by reason of any determination of the actual facts, that led the Secretary to direct a cancellation. It was undisputed upon the hearing before the Department officers, and also upon the trial of this case in the court below, that valuable and sufficient improvements had been made by Hoover, who had been substituted as attorney in fact by McGuire prior to the location. Authority to make the improvements and do all other necessary acts was found in the power, and this authority had not been revoked at the time the improvements were made and the scrip laid. As there was no controversy over the facts, the conclusion of the officials was not really one of a controverted fact, but of law, and subject to revision by the courts. The alleged findings on this point are not governed by the rule, which nearly all courts have adopted, to the effect that findings of departmental officers on controverted facts are conclusive in the absence of fraud, imposition, or mistake, except as they may be reversed on appeal in that department."

Judgment in this case was affirmed by the Supreme Court on appeal, no opinion being written (203 U. S., 582).

And in *Hewett vs. Schultz,* 180 U. S., 139, 157-8, the court declined to accept a certificate of the Commissioner of the General Land Office set out in the findings of fact made by the trial court, to the effect that there was a deficiency in the grant to the Northern Pacific Railroad Company, which could not be satisfied from the indemnity limits of said grant, it appearing from other facts of record that said certificate was an incorrect statement of the facts.

So, findings of fact by the Court of Claims are, as a rule, conclusive in the Supreme Court, its jurisdiction, on appeal, being limited to the consideration of questions of law.

District of Columbia vs. Barnes, 197 U. S., 146;
Collier vs. United States, 173 U. S., 79;
Talbert vs. United States, 155 U. S., 45.

But in *Shaw vs. United States,* 93 U. S., 235, it was held that a finding of the Court of Claims stating a mere conclusion from facts of record was not sufficient. In that case the finding was that a certain vessel "was impressed into the military service of the United States by the Assistant Quartermaster of the United States Army"; and this court held the same to be defective in not setting forth the circumstances which would enable the court to determine whether the vessel was obtained by impressment or contract. This court then went into the evidence and found that the obtaining of the vessel by the authorities of the Government was not an impressment but was under a contract of affreightment.

And in *United States vs. Clark,* 96 U. S., 37, the Court of Claims had made a finding of fact upon certain evidence, and on appeal to the Supreme Court sent up the evidence upon which the finding was based. The court thereupon went into the evidence and found therefrom that there was no legal evidence to establish the fact as found by the Court of Claims, and accordingly reversed its judgment.

So, also, on the question of negligence, which involves a mixed question of fact and of law, the rule is that the Su-

preme Court, on a writ of error to a State court, will not examine into the evidence as to the facts which constitute, or are alleged to constitute, negligence; but will determine from the undisputed facts, or the facts found by the court below, as to whether, *as a matter of law*, there was negligence. Thus, in the case of *Southern Pacific Company vs. Pool*, 160 U. S., 438, 440, where the question was as to whether the plaintiff, in an action against the railroad company for damages, had been guilty of negligence, the court, speaking by Mr. Chief Justice White, said:

> "Was the accident caused by the negligence of Pool?
>
> "To answer this question involves an analysis of the evidence (which the record fully sets out), not for the purpose of weighing the testimony, or of ascertaining the preponderating balance thereof, but in order to arrive at the undoubted proof, from which the legal consequence, negligence, results. There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law. *Union Pacific Railway Company vs. McDonald*, 152 U. S., 262, 283. The rule is thus announced in that case: 'Upon the question of negligence * * * the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Delaware, Lackawanna, &c., Railroad vs. Converse*, 139 U. S., 469, 472, and authorities there cited; *Elliott vs. Chicago, Milwaukee & St. Paul Railway*, 150 U. S., 245; *Anderson County Commissioners vs. Beal*, 113 U. S., 227, 241."

There are also numerous cases in the Supreme Court coming from the highest court of the State in which the suit

could be tried, or from the inferior Federal courts, in which this court has exercised jurisdiction, on writ of error or appeal, to determine from the evidence whether, as matter of law, the findings of fact made by the court below and its conclusion of law therefrom were warranted. Thus, in the case of *The "Francis Wright,"* 105 U. S., 381, 387, the question arose as to the conclusiveness of a finding of fact by the court below, and Mr. Chief Justice Waite, delivering judgment, said:

> "It is undoubtedly true that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other, on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case, the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court."

In *Dower vs. Richards,* 151 U. S., 658, 667, the court, in passing upon the question of what may be reviewed on a writ of error to the supreme court of a State, said:

> "When, indeed, the question decided by the State Court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the *competency* and *legal effect* of the evidence as bearing upon a question of Federal Law, the decision may be reviewed by this court."

In support of the foregoing, the court quoted with approval the following from its earlier opinion in *Mackay vs. Dillon,* 4 How., 421, 447:

"This court has no jurisdiction to consider and revise the decision of a State court, however erroneous it may be, in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of State courts on the *effect* of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a State, when reversing the proceedings of inferior courts of original jurisdiction."

In *Ward vs. Joslin*, 186 U. S., 142, 147, Mr. Chief Justice Fuller, speaking for the court, said:

"When a case is tried by the court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based. The question remains whether or not the facts found are sufficient to support the judgment, and rulings to which exceptions are duly preserved may be reviewed."

This question was elaborately considered in *Kansas City So. Ry. vs. Albers Commission Co.*, 223 U. S., 573, 591 *et seq.*, where Mr. Justice Van Devanter, speaking for the court, said:

"While it is true that upon a writ of error to a State court, we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with, and dependent upon, such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus, in *Mackay vs. Dillon*, 4 How., 421, 447, where the State courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress,

it was held that their decision 'on the effect of such evidence, may be fully considered here.' In *Dower vs. Richards,* 151 U. S., 658, 667, where the conclusiveness of findings of fact by a State court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law the decision may be reviewed by this court.' In *Stanley vs. Schwably,* 162 U. S., 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question and depended upon whether the United States had a good title to the land in controversey. That question turned upon whether the attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State court found that he had such knowledge. In this court, it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said (p. 278): 'But so far as the judgment of the State court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.' And, upon examining the evidence, this court held it to be 'wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan,' and accordingly reversed the judgment of the State court. And in *Schlemmer vs. Buffalo, Rochester & Pittsburg Ry. Co.,* 205 U. S., 1, a case arising under the Federal Safety Appliance Law, wherein the State court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery, this court exercised the power to examine the evidence, notwithstanding a contention that the find-

ing was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute. Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact. *Louisville Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 683, 697, a leading case upon the subject, contains this statement of the settled rule: 'Whether an alleged contract arises from State legislation, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the Constitution of the United States.' A like exercise of this power is shown in cases arising under the clause of the Constitution requiring full faith and credit to be given in each State to the judicial proceedings of every other State. *Huntington vs. Attrill*, 146 U. S., 657, 684, was such a case. It was a suit in Maryland upon a judgment obtained in New York under a statute of the latter State imposing a liability for the debts of a corporation upon a director making a false certificate respecting its condition. The Court of Appeals of Maryland held that the judgment was for a strictly penal liability and therefore not within the protection of the full faith and credit clause. But when the case came here it was held that 'if the State court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.' And upon reaching the conclusion that in that instance the original liability was not strictly penal this court reversed the judgment of the Court of Appeals of Maryland.

"When due regard is had for the rule before indi-

cated, and so often applied in other cases, it does not admit of doubt that in the present case we may examine the evidence, which has been properly incorporated in the record, to determine whether the general finding necessarily involved the decisions of questions of law bearing upon the Federal right set up by the garnishee. And when this is done it is manifest, as is amply illustrated by the résumé which we have given of the evidence and contentions of the parties, that the finding necessarily involved the decision of questions of the interpretation and application of the Interstate Commerce Act (24 Stat., 379, c. 104; 25 Stat., 855, c. 382), and also of other questions of law bearing upon the Federal right such as the legal effect of evidence."

In *Cedar Rapids Gas Co. vs. Cedar Rapids*, 223 U. S., 655, 668, Mr. Justice Holmes, speaking for the court, after stating the general rule that, on writ of error to a State court, the facts as found by that court would be accepted, then went on to say:

"But, of course, findings either at law or in equity may depend upon questions that are re-examinable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court. Such questions properly saved must be answered, and, so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined. *Kansas City Southern Railway Co. vs. Albers Commission Co.*, decided February 26, 1912, *ante*, p. 573. For instance in this case the finding of the court that it was not prepared to say that a ninety cent rate was confiscatory may perhaps be taken to have been made subject to the admission that the rate was too low to permit a discount for prompt payment, and if so opens the question whether it was not confiscatory on that account, as matter of law."

In *Oregon R. R. & N. Co. vs. Fairchild*, 224 U. S., 510, 528, Mr. Justice Lamar, speaking for the court, after finding that the railroad company had had notice and had been given the right to show that an order made by the Railroad Commission of the State would be unreasonable, as taking the property of the company, said:

> "That being so, it leaves for consideration the contention, that as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in *Kansas City Railway Co. vs. Albers Commission Co.*, 223 U. S., 573, 591, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.' *Cedar Rapids Gas Light Co. vs. Cedar Rapids*, 223 U. S., 655; *Graham vs. Gill*, 223 U. S., 643. Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property."

In *Creswill vs. Knights of Pythias*, 225 U. S., 246, 261, Mr. Chief Justice White, delivering judgment, said:

> "While it is true that upon a writ of error to a State court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (*a*) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (*b*) that where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts,

to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co. vs. Albers Comm. Co.*, 223 U. S., 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids, Ib.*, 655, 668; *State of Washington ex Rel. vs. Fairchild*, 224 U. S., 510, 528."

In *Southern Pacific Co. vs. Schuyler*, 227 U. S., 601, 611, the court said:

> "It is insisted (*a*) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a State court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City So. Ry. Co. vs. Albers Comm. Co.*, 223 U. S., 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids*, 223 U. S., 655, 668; *Creswill vs. Knights of Pythias*, 225 U. S., 246, 261."

In *Carlson vs. Curtiss*, 234 U. S., 103, 106, Mr. Justice Pitney, speaking for the court and referring to an assignment of error which charged that the Supreme Court of the State of Washington had refused to make a finding of fact on a material point upon which evidence had been introduced, said:

> "While, in ordinary cases, we are bound by the findings of the State court of last resort respecting

matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the State court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right. *Southern Pacific Co. vs. Schuyler,* 227 U. S., 601, 611, and cases cited."

See also, *North Carolina R. R. Co. vs. Zachary,* 232 U. S., 248, 259; *Interstate Amusement Co. vs. Albert,* 239 U. S., 560, 566-567.

It has been demonstrated from the foregoing that, upon a pure question of fact, depending upon the weight of conflicting evidence, the finding of a tribunal which has been specially created and constituted for that purpose is conclusive, and will not be reviewed by the courts; but that the *legal effect* of such evidence, that is, what *conclusion* should be drawn from such a finding of facts, is a question of *law,* which is reviewable by the courts in a proper proceeding.

Applying these principles to the decision of the Secretary of the Interior of October 4, 1915, in this case, it is too plain for argument that the findings of fact by the Secretary in that decision, as to the physical characteristics of the tract in controversy and his conclusion of law therefrom, are readily separable and distinguishable, and fall within the principles of the foregoing cases, particularly the case of *Marquez vs. Frisbie,* 101 U. S., 475, 476.

As heretofore stated, the Secretary of the Interior, in his said final decision, found—

1. That the land had not been returned as coal land, and that, at the date of the school-land grant of June 21, 1898, no "valid claim was being asserted thereto under the coal-land laws"; and,

2. That, from certain "disclosures" which he mentions, the Black Diamond coal bed underlies the southeast portion of the tract, to the extent of perhaps 27 acres.

With this finding of fact, there is no disposition to raise any question or to undertake to review it in any way; it is only his conclusion of law, from such facts, viz., that the land was *known* to be coal land at the date of said grant, that is denied, and, under the decisions above cited, that conclusion is reviewable.

The Land Not Known Coal Land at Date of School-land Grant.

It is observed that all that is claimed in the decision as regards the existence of known coal on this 40-acre tract, at the date of the grant, is that it is *now*—not *then*—*known* that the Black Diamond bed underlies a portion of it; and that no development had been made of that bed to show whether it contained coal, or if so, how much, or whether it was in merchantable quantity or commercially valuable.

The "disclosure" relied upon as establishing the coal character of the tract, at the date of the grant, had not been developed, and it is not even found as a fact that anyone knew what said disclosures when developed would establish. At that time, then, how can it be said that it was *then known* to be coal land?

The grant to the State vested, if at all, at its date, that is, June 21, 1898. How can it be said, under this finding, that anyone *knew, at that time,* that this tract was coal land? The Land Department itself would not, at that time, have declared that such a showing made the tract *known* coal land;

for, under the decisions of the Department, from the very beginning of the administration of the coal-land law up until long after the date of this grant, it was uniformly and universally held that such a showing did not render land *known* coal land.

As held in the decision of the Secretary of the Interior (which, in this regard, has always been the law), the title of the territory vested *at the date of the grant* unless at that date the land was *known* to be coal land. That is to say, to except the tract from the grant, its coal character must have been *known* at the date thereof. In other words, and to repeat somewhat, the *known* coal character must be determined as of the date of the grant. How was this to be determined excepting on the facts *then known* to exist, and upon the law as it was *then* interpreted?

The State of New Mexico insists that the *known* or *unknown* coal character of the tract embraced in its grant must be determined on the facts, and according to the law existing at the date the grant became effective. It insists, under all the authorities, that, at the date of the grant, the physical facts shown at that time to exist in respect of the land embraced in its grant, the law, as then declared, did not warrant a judgment that the land was *known* to be coal, and that it cannot now, upon a different and changed construction of the coal-land law, be found that it was *then* known to be coal land. The grant vested at its date, or it did not vest at all; and so the question as to whether the grant did or did not vest must be determined as of the date of the grant. These propositions are so elementary that it is difficult to elucidate them by argument. Their mere statement is, or ought to be, sufficient argument in their support.

What, then, would the Department, on June 21, 1898, have held as to the *known* or *unknown* coal character of this tract, upon the facts now found to have existed at that date, had it then been called upon to render a decision? *That* is the test.

It will not do to say that the Department *now* holds that, upon such facts, lands so affected are *known* coal lands. The question is, What would the Department and the courts at that date have decided on such a state of facts? If *known* coal lands were excepted from the grant of June 21, 1898, as they were, and if the grant vested at that date, as it did, then the extent of the exception, or whether there was any exception at all, must be determined *now* as it would have been determined *then*. The grant did not, and could not, stand or remain in abeyance to await the determination, at some future time, as to whether the physical conditions shown to exist, at the date thereof, rendered the land *known* coal land; the grant attached and title thereunder became vested at its date to all the school lands embraced therein unless, at that date, they were *known* to be coal land. A grant of public lands speaks as of its date; and the extent of the grant, or what has been granted, must likewise be determined as of the same date, according to the law, as at that date, determined. And so, what is excepted from the grant, if there be any exception, must be determined upon the law as at that time construed.

The reason for this construction, or for these propositions, is found in the fact that Congress, in making the grant, is understood to speak as of that date, and to have taken into consideration the conditions then obtaining, and the law as then construed by the courts and the Department having to do with the execution or carrying out of the grant.

Furthermore, "a legislative grant is a contract executed," *Fletcher vs. Peck*, 6 Cranch, 87; and hence, the contracting parties thereto (here the United States and the then Territory of New Mexico) must be understood to have entered into the contract, and the contract became an executed one, in the light of what the understanding of its terms then was. If anything can be considered as settled in the law, it is that, at that date, what was understood as "known coal lands" had acquired a definite meaning; and as will be hereafter demon-

strated, a showing as to coal character of lands, such as is made in this case, was not considered, at that date, and had never before been considered, as sufficient to classify them as "known coal lands."

Statutes are to be Construed as of the Date of Their Enactment.

The true rule is that statutes are to be construed as they were intended to be understood when they were passed.

> "A statute is to be interpreted in accordance with the meaning of its words *at the time of its passage.*"
> 23 Am. & Eng. Enc. Law (1st ed.), Title "Statutes" (p. 327).

> "In matters of description a statute must necessarily refer to things *as they exist at the time of its passage.*"
> *Griswold vs. Atlantic Dock Co.*, 21 Barb. (N. Y.), 228.

> "If a statute makes use of a word, the meaning of which is well known and has a definite sense at the common law, the word shall be expounded and restricted to that sense."
> *Buckner vs. Real Estate Bank*, 4 Ark., 441.

> "It is a sound rule that whenever our legislature use a term without defining it, which is well known in the English law, and there has a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law."
> *Hillhouse vs. Chester*, 3 Day (Conn.), 211.

See also—

United States vs. Smith, 4 Day (Conn.), 121; *Corning vs. Board of Commissioners*, 102 Fed. Rep., 57.

An application of this rule was made by the Supreme Court of the United States in the early case of *Curtis vs.*

Martin, 3 How., 106, 110, in the construction of the tariff act of 1832. In that case the collector of the port of New York, in 1841, had levied certain duties upon an importation of "gunny cloth," claiming that it was dutiable as "cotton bagging." The importer protested, and afterwards brought suit to recover the duties paid, claiming and proving that in 1832, when the tariff act was passed, "gunny cloth" was not used as "cotton bagging," and that it was not so used until 1834. His legal proposition contended for was that the act of 1832 spoke as of its date, and that, therefore, "gunny cloth" not being used at that date as "cotton bagging," although it was so used in 1841, when the duties were levied, said duties had been improperly levied and should be recovered. His contention was sustained by the courts, and Chief Justice Taney, delivering the judgment of the Supreme Court, said:

> "It follows that the duty upon cotton bagging must be considered as imposed upon those articles *only* which were known and understood as such in commerce *in the year* 1832, *when the law was passed imposing the duty.*"

In Endlich on the Interpretation of Statutes, section 85, it is said:

> "The rule which requires the construction of statutes with reference to their objects and subject-matters, obviously also requires the language of a statute, as of every other writing, to be construed in the sense which it bore at the period when it was passed. * * * Undoubtedly, all laws must be executed according to the sense and meaning they imported at the time of their passage."

In *Platt vs. Union Pacific R. R. Co.*, 99 U. S., 48, 60, which was a case involving the construction of the act of Congress of July 1, 1862, making a grant of lands to the Union Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the Missouri River to the

Pacific Ocean, Mr. Justice Strong, speaking for the court said:

> All will concede that in construing the act of 1862, we are to look at the state of things *then existing*, and in the light *then appearing* seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions."

And again (63-64), answering the argument against placing a construction upon the act which, in the light of experience in dealing with that legislative grant, would appear to be more in consonance with the state of things existing at the date of the decision, though very different from what were the conditions at the date of the grant, he said:

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. We may *now* think it quite possible the lands could all have been sold before July 1, 1877. The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of the railroad have shed new light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

> "Statutes are to be construed as they were intended to be understood when they were passed. * * * The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation."
> *County of Schuyler vs. Thomas*, 98 U. S., 169, 172.

> "No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference

> to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events."
>
> *United States vs. Union Pacific R. R. Co.*, 91 U. S., 72, 81.

Now, on June 21, 1898, when the school-land grant to the Territory of New Mexico took effect, the term "known coal lands" had acquired a definite and well-understood meaning, and that meaning was always determined, not alone by geological conditions or by surface indications (though such disclosures were taken into account), but in all cases, up to the date of the Circular of Instructions of October 26, 1905, 34 L. D., 194, it had been held that "known coal land" was only such from which coal in a merchantable quantity and commercially valuable had been produced or extracted. That is, no lands were *known* to be coal unless a coal mine had been opened thereon and valuable coal taken therefrom.

One of the early expressions of the Department on this question is found in the case of *Kings County vs. Alexander*, 5 L. D., 126, 127, where Mr. Secretary Lamar, speaking particularly as regards coal lands, said:

> "It has been repeatedly held by this Department that the proof of the mineral character of land must be specific and based upon the *actual production* of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from *actual production* of mineral and not from a theory that the lands may hereafter produce it. Hooper *vs.* Ferguson (2 L. D., 712); Dughi *vs.* Harkins (*ibid.*, 721); Roberts *vs.* Jepson (4 L. D., 60); Cleghorn *vs.* Bird (*ibid.*, 478); Lientz *et al. vs.* Victor *et al.* (17 Cal., 272); Alford *vs.* Barnum *et al.* (45 Cal., 482)."

See also—

Rice vs. State of California, 24 L. D., 14, 15, and cases cited.

Jones vs. Driver, 15 L. D., 514, 518.

Hamilton vs. Anderson, 19 L. D., 168, 169.

McWilliams vs. Green River Coal Ass'n, 23 L. D., 127, 130.

And as late as March 11, 1905, in the case of *Robert Dwyer vs. Ernest H. Schwiethale,* which was a protest against a homestead entry, alleging that the land was coal land, and which involved certain lands in the Durango, Colorado, district, Secretary Hitchcock, in an unreported decision, affirming the decision of the General Land Office of January 30, 1904, upon a similar state of facts, said:

> "It is not enough, to characterize land as chiefly valuable for its deposits of coal, to show that there is a vein of coal thereon; but it must affirmatively appear from the evidence that the coal exists in such quantity and quality as to make the land more valuable on that account than for other purposes."

In the case of *Jones vs. Driver, supra,* decided December 2, 1892, the coal indications or disclosures on the land there in controversy were much more numerous and much better defined than in the case at bar, various witnesses having testified to the existence of coal croppings and to exposed veins of coal of from 4 to 6 feet in thickness; and yet the Department held that such land could not be considered as coal land, because there had not been any *production* of coal thereon, saying (p. 518):

> "It has been repeatedly held by the Department that it must appear that the land in dispute is valuable for its mineral and that *the proof must be specific and based upon actual production.*" Citing authorities.

This rule was specifically recognized as having been the universal rule of the Interior Department from the begin-

ning of the administration of the coal land, in the *instructions* of October 26, 1906, and numerous decisions to that effect were therein referred to (34 L. D., 199-200).

That was also the rule laid down by the Supreme Court in *Colorado Coal & Iron Co. vs. United States,* 123 U. S., 307, 328, where the coal-land law was under consideration, the court, speaking by Mr. Justice Brewer, saying:

> "The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preemption act cannot be successfully assailed."

As to what is meant by the term "known mines" or as to the general expression "lands *known* to contain minerals" and as to what is sufficient knowledge of such facts, attention is invited to the following authorities:

Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374, 383, 384.

Iron Silver Co. vs. Mike & Starr Co., 143 U. S., 394, 403.

United States vs. Iron Silver Mining Co., 128 U. S., 673, 683.

United States vs. Reed, 28 Fed., 482, 487.

United States vs. Blackburn, 48 Pac., 904, 905.

Davis's Admr. vs. Weibbold, 139 U. S., 507, 524, 525.

Snyder on Mines, Sec. 667.

Reid vs. Lavellee, 26 L. D., 100, 103.

In other words, if there were on the lands such coal development or such proof of "workable deposits of coal," of a "merchantable character," and "commercially valuable" as would have been accepted by the Government, *at the date of the school-land grant to New Mexico,* as meeting the requirements *then* demanded for known coal lands, the land did not pass to the Territory, but remained in the United States for mineral disposition. But if, on the other hand, the disclosures *then* known to exist on the land would not have been sufficient to warrant the classification of it as coal land, it was not "known" coal land, and it did pass to the Territory under said grant. The test is, did the known condition, *at that date,* bring the land in the category of what was *then* denominated and acted upon as "known coal land"? Tested by this rule, which is the only true test, there cannot be any possibility of doubt on the question. No one, neither the Government nor a coal applicant, would, *at the date of said grant,* have treated this particular 40-acre tract as "known coal land," under the rules and decisions *then* obtaining; and this being true, as it is, beyond controversy, it is respectfully submitted that there was no legal power or authority in the Department to decide *now* that the conditions then existing made the land "known coal land" if, *at that time,* such conditions were not regarded (as they were not) as sufficient to render the land "known coal land," under the rules and decisions then in force. It is THE LAW AT THAT TIME THAT GOVERNS. Whether the land passed to the Territory under the grant must be determined by WHAT THE LAW WAS CONSIDERED TO BE AT THAT DATE. This principle of law is elementary.

Nothing was said in the case of *Diamond Coal & Coke Co. vs. United States,* 233 U. S., 236, which in anyway modifies, or tends to modify, the foregoing rule of law as enunciated in prior decisions just referred to, or that would bring this case, on the facts as found by the Secretary of the Interior, within what was said

in that case. There the exposures and coal disclosures on the land in controversy were such as to convince practical coal miners of the existence of a workable vein of coal in the land. In this case, no such disclosures were found on this land at the date of the school-land grant, according to the decision of the Secretary of the Interior; and the additional facts, as found by the Secretary, that coal prospectors about that time and prior thereto had abandoned whatever claims they had attempted to initiate thereto, and that no further attempt to discover coal on the land until some thirteen years afer the grant had become vested in the Territory is convincing proof that it was not *known coal land*, within the meaning even of the decision just referred to.

The further fact referred to in defendant's brief that, at one time, the authorities of the Territory of New Mexico had mistakenly attempted to "waive" the Territory's claim to the land is not material here . That question was disposed of by the Secretary of the Interior in his decision, upon all the facts in the case in relation thereto, and is not open to consideration in this proceeding.

Rights Acquired under One Interpretation of the Law Cannot be Divested by a Change in the Interpretation Thereof.

It is a fundamental principle of law that rights once vested cannot be divested by a change in the interpretation of the law under which they vested. Likewise, it is fundamental in the jurisprudence of the Land Department that rights acquired under an existing construction of the law will not be impaired by a later and different interpretation of the same law. The authorities in support of these propositions are uniform. A few only will be referred to.

In *Gelpcke vs. City of Dubuque*, 1 Wall., 175, 206, the Supreme Court quoted with approval the following from the opinion of Chief Justice Taney in the case of *Ohio Life and Trust Company vs. Debolt*, 16 How., 416, 432:

"The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the Government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law";

And continued:

"The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

In *Douglass vs. County of Pike,* 101 U. S., 677, 687, Chief Justice Waite, after reviewing a number of previous cases on this subject, said:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

"So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

See also—

Rowan vs. Runnels, 5 How., 134.
Olcott vs. Supervisors, 16 Wall., 678, 690.
Taylor vs. Ypsilanti, 105 U. S., 60, 72.
Anderson vs. Santa Anna, 116 U. S., 356, 362, and cases cited.
Gulf & Ship Island R. R. Co. vs. Hewes 183 U. S., 66, 71.

The same principle applies and has been fully recognized in the administration of the Land Department—that is to say, the rule of the Department has always been that rights acquired under an existing construction of the law will not be impaired by a later and different interpretation; or, to express the same proposition somewhat differently, a changed construction of the law will not impair rights acquired under a former interpretation of the same law.

Cudney vs. Flannery, 1 L. D., 165, 166;
Miner vs. Mariott, 2 L. D., 709, 711;
Allen vs. Cooley, 5 L. D., 261;
James Spencer, 6 L. D., 217, 218;
Kelley vs. Halvorson, 6 L. D., 225, 227;
William Thompson, 8 L. D., 104, 109;
St. Paul, Minneapolis & Manitoba Ry. Co., 8 L. D., 255, 262-263;
Mary R. Leonard, 9 L. D., 189, 190-191;
John M. Lindback, 9 L. D., 284, 286;
Smith Hatfield, 17 L. D., 79, 80-81;
Knight vs. Hoppin, 18 L. D., 324, 325-326;
Bender vs. Shimer, 19 L. D., 363, 365;
Samuel E. Crow, 42 L. D., 313, 314;
Rough Rider and other Mining Claims, 42 L. D., 584, 587-588, and cases there cited.

Applying the principle announced in the decisions just referred to, to the facts of this case, how can any doubt

arise on the question as to whether the school-land grant of June 21, 1898, should be *now* construed and acted upon as it would have been construed and acted upon *at that time?* In other words, if, at the date of the grant (it being a grant *in præsenti* taking effect as of its date), the law as then interpreted would have declared that the "disclosures" on the face of the land in controversy did not make the land "*known* coal land" (and it would have done so had the question been presented *at that time*), the authorities just referred to are absolutely clear to the point that it cannot *now* be legally declared that such "disclosures" rendered the land "*known* coal land" *at that date.* It must *now* be decided upon the facts of record, as it would have been decided, on the same facts, *at that time.* If that principle is not sound under the decisions referred to, then counsel must confess that it is impossible for him to understand the purport of said decisions.

Vested Rights Protected.

There is another well-settled principle of law, which has been hinted at in the foregoing, but which will be now more fully discussed, that leads to the same conclusion. It is this:

The title of the Territory of New Mexico to its school lands *vested,* if at all, at the date of the grant. This is elementary, and the authorities in its support are so numerous as to not require citation. Let some of the authorities on the question of what is meant by *vesting* of a title be considered:

In 4 *Kent's Comm.,* 202, the learned author says:

> "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seisin."

In *Bouvier's Law Dictionary* it is said:

> "To VEST, *estates*, is to give an immediate fixed right of present or future enjoyment; an estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest, when there is a present fixed right of future enjoyment."

In 28 *Am. & Eng. Enc. of Law* (1st ed.), page 442, note 3, title "Vested," it is said:

> "'By a vested estate, in relation to interests of a freehold quality, is to be understood an interest clothed, as to legal estates, with a legal seisin, or, as to equitable estates, with an equitable seisin, which enables the person to whom the interest is limited, to exercise the right of present or future enjoyment immediately, in point of estate. A vested estate is an interest clothed with a present legal and existing right of alienation.' 1 Preston on Estates, 65, followed in Hayes *vs.* Goode, 7 Leigh (Va.), 496.
>
> "'Estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect, remains uncertain.' Tayloe *vs.* Gould, 10 Barb. (N. Y.), 396.
>
> "'An estate is vested when there is a person in being who will take if the precedent estate then terminates.' Sheridan *vs.* House, 4 Keyes (N. Y.), 587."

Words and Phrases, second series, volume 4, page 1166, in defining vested rights, says:

> "Rights are 'vested' when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. *Trustees of Presbytery of Jersey City vs. Trustees of First Presbyterian Church of Weehawken*, 80 N. J. Law, 572."

Again:

> "A 'vested right' may be considered as the power to do certain actions or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is protected by those provisions in the Constitution which apply to such rights."

In *Gladney vs. Sydnor*, 172 Mo., 318, the court says:

> "Vested rights may be created either by the common law, by statute, or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection."
>
> * * * * * * *
>
> "A failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it in nowise affects or lessens that right." *Trustees of Presbytery of Jersey City vs. Trustees of First Presbyterian Church*, 80 N. J. Law, 572; *Graham vs. Great Falls Water Power & Town-Site Co.*, 30 Mont., 393; *Evans-Snider-Buel Co. vs. McFadden*, 105 Fed., 293; *Downs vs. Blount*, 170 Fed., 15; *National Bank of Commerce vs. Jones*, 18 Okl., 555; *Lohrstorfer vs. Lohrstorfer*, 140 Mich., 551; *Marshall et al. vs. M. E. and S. V. King et al.*, 24 *Miss.*, 85.
>
> See also *Crump vs. Guyer*, 157 Pac. Rep., 321, 323.

In the light of these authorities, upon what state of facts, and under what law, is it to be determined whether the Territory's title did or did not *vest* at the date of the grant? Manifestly, upon the facts *then known* to exist, and under the law as then construed and interpreted. For, if not under the law as then interpreted, *when* was the interpretation of the law to become effective? Was the question of the vesting of title to the grant to remain in abeyance and subject to varying constructions and interpretations of the granting act? When was the question to become finally settled? How could there be a *present* vesting of title unless

it was under the law, as *then* construed and interpreted? These questions suggest their own answers. Manifestly, whether the title *vested* to any particular tract must be determined by the *known* mineral or non-mineral condition of such tract at the date of the grant, and whether the physical conditions then *known* to exist were such as that they constituted *known* mineral land or not. So, in this case, it may be conceded for present purposes that the "disclosures" on this 40-acre tract were known to exist at the date of the grant. But, in order to defeat the vesting of the grant to said 40 acres, *at that date,* that is not enough; it must also appear that said "disclosures," *at the date of the grant,* were then, under the law as *then* interpreted, such as to make the tract "known coal land," and, *at that time,* the law did not declare such land "known coal land," as has been abundantly and clearly shown in the foregoing. Hence title under the school-land grant became vested in the Territory at the date of the grant.

To hold otherwise would be to make the school-land grant a conditional one, dependent upon what, perchance, might be thereafter decided by the Department. It would leave the question as to whether title under the grant *vested* or not "in the air." How could the title *vest* at a particular date except under the law as *at that date* declared and interpreted?

Keepers Not an Indispensable Party to This Suit.

The fourth specification in the motion to dismiss reads as follows:

> "*Fourth.* That it appears from the bill that one George A. Keepers, Jr., has purchased the land involved from the United States, and is therefore an indispensable party."

It is impossible to perceive why or upon what grounds Keepers should be a party to this suit. The bill charges

that absolute title in fee to the land in controversy became vested in the Territory of New Mexico at the date of its school-land grant of June 21, 1898, which title thereafter, under the statutes of the United States, passed in the State of New Mexico, the complainant herein; and that the alleged claim of Keepers thereto was not initiated until in 1911, thirteen years after the absolute title in fee had passed out of the United States. If the theory of the bill be correct, in law, as has been demonstrated in the foregoing, then there has never been an instant of time since the date of said grant of June 21, 1898, that the United States had any title to the tract in question, and consequently there has never been any time since June 21, 1898, that it had any title to convey to this coal-land applicant or to anyone else, and its attempted conveyance to him was wholly without legal authority, and was absolutely a void proceeding from the very beginning thereof. This being so, said coal-land applicant, coming in 13 years after the title to the land had passed out of the United States and become vested in the Territory of New Mexico, the predecessor in title and interest of the complainant, certainly cannot have any interest in the present suit and consequently is not even a proper party, much less an "indispensable party," to this suit.

> "Necessary parties are those without whom no decree can be effectively made."
>
> 17 Am. & Eng. Ency. Law (1st ed.), Title "Parties to Actions," p. 649.

One against whom no judgment in any form can be rendered is not a necessary, nor even a proper party.

Conklin vs. Thurston, 18 Ind., 290.

> "No one need be made a party complainant in whom there exists no interest, and no one a party defendant from whom nothing is demanded."
>
> *Kerr vs. Watts,* 6 Wheat., 550, 559.

In *Vattier vs. Hinde,* 7 Pet., 252, 263-4, the court said:

"It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, to decree as between them. Although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties had they been made amenable to its process, this circumstance shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting their interests.

"In the case of *Osborn vs. The Bank of the United States,* 9 Wheat., 738, this point was made and relied on by the appellants. A tax had been imposed by the legislature of Ohio on the Bank of the United States, which had been forcibly levied by the officer employed to collect it. A bill was filed against this officer, and against the auditor and treasurer of the State, praying that the money might be restored to the bank, the act imposing the tax being unconstitutional. The process was served while the money was yet in the hands of the officer. The court decreed the restoration of the money, and the defendants appealed. The appellants insisted that the State of Ohio was the party really interested; that the treasurer, auditor, and collecting officer were its agents; and that no decree could be made unless the principal could be brought before the court.

"This court admitted the direct interest of the State, and added, 'had it been within the power of the bank to make it a party perhaps no decree ought to have been pronounced in the cause until the State, was before the court. But this was not in the power of the bank.' The jurisdiction of the court was sustained, and the decree affirmed.

"This is a stronger case than that under consideration. The money in contest would have been paid into the treasury of the State, had the bill been dismissed for want of proper parties. The decree arrested the money in its progress to the treasury, and restored it to the bank. All must admit that the State

> ought to have been made a party, had it been amenable to the process of the court. Yet this direct interest did not restrain the court from deciding the merits of the cause between the parties before it."

In *Elmendorf vs. Taylor,* 10 Wheat., 152, 167, Chief Justice Marshall, speaking for the court, said:

> "Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes. * * * In addition to these observations, it may be proper to say, that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other State, ought not to prevent a decree upon its merits. It would be a misapplication of the rule, to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

In *Williams vs. Bankhead,* 19 Wall., 563, 571, the court, speaking by Mr. Justice Bradley, said:

> "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule

arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: * * * Thirdly. Where he (a person) is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

In *Payne vs. Hook*, 7 Wall, 425, 431, the court said:

"It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. *Cooper's Equity Pleading*, 35.

"The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. *West vs. Randall*, 2 Mason, 181. Story's Equity Pleading, Sec. 89 and *sequentia*."

In *Hale vs. Hale*, 146 Ill., 227, 256-257, the court said:

"It is unquestionably a general rule, subject, however, to certain well recognized exceptions, that in proceedings in equity the interests of parties not before the court will not be bound by the decree. But among the exceptions is one growing out of convenience or necessity in the administration of justice, which has given rise to what is known as the doctrine of representation. Thus, where it appears that a particular party, though not before the court in person, is so far represented by others, that his interests receive actual and efficient protection, the decree may

be held to be binding upon him. * * * Another illustration may be found in cases where there is real estate in controversy which is subject to an entail, where it is generally sufficient, all the parties having antecedent estates being before the court, to make the first tenant in tail *in esse*, in whom the estate of inheritance is vested, a party with those claiming prior interests, without making any persons parties who claim in remainder or reversion of such vested inheritance. And it will make no difference whether the bill is brought by or against such tenant in tail, as he will in each case be equally the representative of the subsequent estates and interests; and a decree for or against such first tenant in tail will generally limit those in remainder or reversion."

Citing authorities:
Story, Eq. Pldg., sec. 144, *et al.*

In *Calvert on Parties in Suits in Equity*, 19, the doctrine of representation, considered as an exception to the general rule requiring all persons in interest to be made parties, is stated as follows:

"It is a rule founded upon the advantage which all persons interested will derive from the completeness of the decree, and from the entire settlement of the matter in litigation; in other words, it is founded upon convenience; and the same principle guides our courts of equity in the mode of putting the rule into operation, as they never allow it to produce any inconvenience which can safely be avoided. With this view they have adopted the principle of representation. Persons may be required as parties * * * because they are the owners or guardians of certain interests which the suit will affect. * * * If the general rule requires a person to be present merely as the owner and protector of a certain interest, then the proceeding may take place with equal prospect of justice, if that interest receives an effective protection from others. It is the interest which the court is considering, and the owner, merely as the guardian

of the interest; if then some other persons are present, who with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be required, and the court may, without putting any right in jeopardy take its usual course, and make a complete decree. * * * The absent party appears by his representatives, his interest is protected, his claim is enforced."

In *California vs. Southern Pacific Co.*, 157 U. S., 229, relied upon by the defendants in this connection, the main question involved on the merits was as to the validity of a grant made by the legislature of California to the city of Oakland of the tide lands of the State within the limits of the city, and to whether said grant had been repealed. The Southern Pacific Company, a Kentucky corporation, was claiming some of said lands under a grant from the city, and was the defendant in the suit brought by the State; and it was held that the city was a necessary party to the suit, and that inasmuch as it could not be made a party without ousting this court of its original jurisdiction, therefore the suit should be dismissed. That, as will be observed, was an entirely different situation from what is presented in the case at bar. The city of Oakland was a necessary party to the litigation, for the reason that the validity of its grant from the State was attacked by the State, and it was of the most vital interest to the city to have said grant sustained. The relation of the city to the State, under those circumstances, was direct, and the question at issue on the merits could not be litigated without affecting the interests of the city under its grant. Here, on the other hand, Keepers has no direct relation to the complainant, the State of New Mexico, and the complainant is not seeking any relief against him. His interest, if interest he has, grows out of his relations with the United States and the illegal acts performed and about to be performed by officials of the United States. If he shall fail in his claim against the United

States, he still has his remedy to recover the purchase price he has paid for the land from the United States under the repayment statutes. Under the theory of the complaint, Keepers' alleged claim was initiated to the land some thirteen years after the title to the same had passed out of the United States into the complainant, the State of New Mexico. The question at issue, on the merits here, is as to whether title to the land in question did actually pass out of the United States on June 21, 1898, the date of the school-land grant to the Territory of New Mexico, the predecessor of the complainant, and that question is to be decided as of that date and between the parties litigant in this suit; hence Keepers, by injecting himself into the transaction 13 years after that date, cannot secure the status of an indispensable or necessary party to the present suit.

Keepers is not claiming anything from the State of New Mexico, nor is the State claiming anything from him. It has no controversy with him of any kind or character. The gist of the complaint is, that the officials of the United States are undertaking, in violation of law, to take the property of the complainant and convey it to Keepers. His name is used in the bill simply to describe the illegal action the defendants are undertaking to perform. No relief against him is asked and none could be asked on the facts disclosed by the bill. Any wrong which he might be made to suffer by a decree against the defendants is one in which the complainant has no concern, but is one for which he should seek a remedy against the United States or its officials having charge of public lands.

He comes squarely within the principles announced in *Willard vs. Tayloe,* 8 Wall., 557, 571, which was a case for specific performance of a contract for the sale of land, and it appeared that the plaintiff had transferred a partial interest in the contract to his brother subsequent to its execution. It was claimed that the latter was a necessary party to the suit; but this court denied such contention, and, speaking, by Mr. Justice Field, said:

"The brother is no party to the contract, and any partial interests in contracts for land, acquired subdefendant was not bound to notice. The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern."

So, in this case, for like reasons, Keepers, having endeavored to initiate a claim to the land in controversy 13 years after an absolute title in fee thereto had passed out of the United States and become vested in the Territory of New Mexico, the predecessor in title and interest of the complainant, is not even a proper party to the suit, much less an indispensable party to it. In the language of the court, his claim is one which the complainant "was not bound to notice."

It results from the foregoing that the motion to dismiss the bill of complaint herein should be denied; that the absolute title in fee to the land involved in this suit vested in the Territory of New Mexico at the date of its school-land grant of June 21, 1898, and that said title, by proper legal authority, thereafter became vested in fee in the State of New Mexico, the complainant in this bill; that the attempted disposal and patenting of said land to a coal-land applicant by the Secretary of the Interior and the Commissioner of the General Land Office was wholly without authority, and their action therein was absolutely void in law, and that an injunction against those officials, as prayed in the bill, should be granted to prevent the consummation of their attempted illegal acts.

Respectfully submitted,

HARVEY M. FRIEND,
Of Counsel for the Complainant.